Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

CLARENCE CONYERS, JR.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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185 pp

CAPITAL CASE

QUESTION PRESENTED

Charles Johnson testified as a State witness at Clarence Conyers's trial and capital sentencing proceedings to statements made by Conyers providing details of the murder of Wanda Johnson, for which Conyers received the death penalty. Prior to trial, the State provided open file discovery to defense counsel, which included the existence of a plea agreement with Charles Johnson in connection with robbery and related charges pending against him. Not only was the fact of a plea agreement disclosed to defense counsel, but the terms of that agreement and Johnson's written statement to the police were also provided to defense counsel. Johnson was questioned and cross-examined at Conyers's trial and sentencing on his motives for speaking with the police and testifying at trial, to include the fact that what began as a 19-count indictment against him ultimately ended in a plea agreement to conspiracy to rob and a one-year sentence. The state appellate court held, nonetheless, that failure on the part of the State to disclose documentation concerning the negotiations between either the police or prosecutor and Johnson leading to the plea agreement violated *Brady v. Maryland*, 373 U.S. 83 (1963).

The question presented is:

If the State informs defense counsel of the existence of a plea agreement with a government witness, the terms of that agreement, and the witness's written statement, does *Brady* require that the State provide details of any negotiations leading up to the plea agreement?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002), reversing the judgment of the Circuit Court for Wicomico County, is reproduced in Appendix A. (App. 1a-64a).

The unreported opinion of the Circuit Court for Wicomico County, Maryland, in *In Re: Clarence Conyers, Jr.*, Case No. 96CR0458, 96CR0460, denying Conyers's petition for post conviction relief, is reproduced in Appendix B. (App. 65a-144a).

Conyers first received a death sentence in 1996, which the Court of Appeals of Maryland vacated based on trial court error in admitting a pre-sentence investigation referring to non-adjudicated juvenile charges. *Conyers v. State*, 345 Md. 525, 693 A.2d 781 (1997). A second death sentence imposed in 1998 was affirmed on appeal. *Conyers v. State*, 354 Md. 132, 729 A.2d 910, *cert denied*, 528 U.S. 910 (1999).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland granting Conyers post conviction relief in the form of a new trial was filed on February 5, 2002. This petition is filed within 90 days of issuance of the opinion of the Court of Appeals of Maryland, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §

1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Related to Convictions and Sentence

The facts underlying Conyers's convictions for the murders of Wanda Johnson and Lawrence Bradshaw were set out in detail by the Court of Appeals of Maryland as follows:

> At approximately 9:35 p.m., on Friday, October 21, 1994, Petitioner's estranged girlfriend, Monica Wilson, went to visit her mother, Wanda Johnson, at the home Ms. Johnson shared with her husband, Elwood Johnson. Ms. Wilson had just spoken with her mother at 9:00 p.m. that evening, and her mother had agreed to babysit for Ms. Wilson's son. Arriving with Ms. Wilson at the Johnson home was her cousin, Carla Clinton.
>
> As the two women approached the Johnson home,

they saw someone looking outside through a second floor bedroom window. The women knocked on the door, and, as they waited for someone to open it, they saw through a window a man walking down the stairs. The women saw this man turn off the lights inside the house and duck down as if to avoid being seen. The two women walked to a back door and knocked on it. The women heard sounds of a struggle, described as a "commotion," "tussling" and "fighting," coming from inside the house. Then Ms. Johnson began to scream, and a window on the second floor broke over the women's heads.

The two women fled to the home of a relative who lived nearby and called the police. On the way to the relative's house, Ms. Wilson noticed a car parked across the street from her mother's house. The car resembled one that Petitioner sometimes borrowed from his former girlfriend and mother of his child, Debra Meyers. Upon returning to the Johnson home, Ms. Wilson was informed by the police that her mother was dead.

There were no signs of forced entry into the Johnson home. Wanda Johnson's body was found in the master bedroom. She had been shot three times in the head, once in the back, and once in the arm. It was Ms. Johnson's custom to keep a small amount of money in her wallet. Furthermore, when Ms. Wilson spoke to Ms. Johnson earlier that evening, at approximately 9:00 p.m., Ms. Johnson said that she had twenty dollars. Ms. Johnson's open wallet was found atop her dresser in the master bedroom; there was no money in the wallet. In the den, a door to a closet had been forced open, revealing a safe. The

closet door had a hasp and a lock on it for security, but the hasp and lock had been pried out of the door jamb to gain access to the closet. Pulling the hasp out of the door jamb had caused splinters to fall on the floor around the closet. The safe inside the closet was closed. Mr. Johnson opened the safe the day after his wife's murder; it contained fifteen dollars.

The next day, Ms. Clinton worked with a police artist on a sketch of the man she had seen on the staircase inside the Johnson home the evening before. Ms. Wilson was asked to look at the sketch that had been made based on Ms. Clinton's description. Petitioner, who had come to the police station to keep Ms. Wilson company, took the sketch away before Ms. Wilson had a chance to see it, telling the police that the sketch would upset her. When Ms. Wilson finally had a chance to see the police sketch, she did not immediately identify Lawrence Bradshaw as the man depicted in the sketch. She made a photo identification of another man, who was arrested and incarcerated for a brief time as a result. Ms. Wilson later agreed, however, that the police sketch looked like Lawrence Bradshaw.

Shortly after 1:00 a.m. on October 23, 1994, approximately 27 hours after the murder of Ms. Johnson, Lawrence Bradshaw was shot in the 4300 block of McDowell Lane. This street is located in the Lansdowne area, near Debra Meyers's home. Mr. Bradshaw had been shot three times in the head, once in the back, once in the arm, and once in the finger. Mr. Bradshaw was taken to Shock Trauma, where he died the following day. *Conyers I*, 345 Md. at 534-36, 693 A.2d at 785-86.

* * *

At the second capital sentencing hearing, during the State's case, Charles Johnson (no relation to the victim, Wanda Johnson, or her husband) testified that while he was Petitioner's cellmate at the Baltimore County Detention Center in October-November of 1994, Petitioner discussed the robbery at Johnson's home. Charles Johnson stated Petitioner told him that he and a person named "Molek" went to Wanda Johnson's house and Petitioner went upstairs to rob a safe. Charles Johnson testified:

> "During the robbery, someone came to the door. At that point, Ms. Johnson yelled out . . . her daughter's name or something of that nature. And Clarence panicked, because, I guess, they would recognize him is what he said, and as a result, he wound up shooting Ms. Johnson."

Charles Johnson went on to state that Petitioner told him that while both he and "Molek" were upstairs at first, when they heard noise, "Molek" ran downstairs. After Johnson was shot, "Molek" ran but Petitioner waited until no one was outside before he left.

Wanda Johnson's husband, Elwood Johnson, testified that Petitioner was a frequent visitor to their home. He also described the layout of the home, providing specific details about a spare bedroom that contained a safe in a closet. The safe, which contained personal papers and petty cash, had a combination lock and the closet was secured with a lock and hasp. Mr. Johnson stated that earlier in the day, the safe and closet were in normal condition but when he returned after the shooting the closet had been forced open and the hasp was broken.

> Furthermore, his wife's wallet was lying open on a dresser in their bedroom, which normally would have been inside her purse and placed in a cabinet or dresser drawer.
>
> Wilson, the victim's daughter, basically recapped her trial testimony, describing her past relationship with Petitioner, her arrival at her mother's home with her cousin and son, hearing noise and her mother's screams, fleeing the scene and going for help down the street, and finally being informed of her mother's murder. Wilson also testified to Petitioner's efforts to prevent her from seeing the composite sketch of Bradshaw that her cousin helped develop and to keep her from reading or viewing any news related to the murder. Wilson stated Petitioner knew about the safe in her parents' spare bedroom and that he was aware her mother was not normally home on Friday evenings. Wilson knew that Petitioner owned a .38 caliber pistol, the type of weapon used to kill her mother.

(App. 83a-88a) (quoting *Conyers v. State*, 354 Md. at 143-47, 720 A.2d at 915-18).

B. Facts Related to the *Brady* Issue

The State complied with a defense request for *Brady* material and provided open file discovery to defense counsel, which included a January 1995 plea agreement between the State and Charles Johnson with respect to pending robbery and related charges. (App. 22a-23a). At a pre-trial suppression hearing relative to Conyers's statements to Johnson, Johnson testified that he contacted the police on Conyers's behalf and "didn't right out ask for

a deal" because he did not believe that the police could offer him a deal. (App. 23a-24a).

At the guilt/innocence trial, Johnson repeated that he went to the police on Conyers's behalf with the intent to help him, and defense counsel questioned such motivation. (E. 199-200). Defense counsel proceeded to cross-examine Johnson about several prior convictions and then addressed the indictment pending against him at the time he was Conyers's cell mate. (E. 190-95).[1] Defense counsel established that Johnson could have been facing a total of 244 years as maximum punishment, but that, as a result of an agreement with the State, could receive as little as one year. (E. 195-97). Defense counsel questioned Johnson about lies he allegedly told while in jail and the fact that Johnson "pumped" other people at the jail for information about their cases. (E. 201-03). Johnson denied reading any of the documents in Conyers's possession. (E. 203-04). He also denied claiming that Conyers would be his way out of jail. (E. 206). Defense counsel concluded cross-examination by pointing out that Johnson would receive a favorable sentence only if he implicated Conyers in the murders of Wanda Johnson and Lawrence Bradshaw. (E. 207-09).

At the re-sentencing proceeding, Charles Johnson essentially repeated his trial testimony. (E. 402-03). During cross-examination, Johnson acknowledged that he had a written agreement with the State to testify. (E. 407). Defense counsel reviewed charges which were pending

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[1] The references herein to E. are to the Record Extract that was filed in the Maryland Court of Appeals in *Conyers v. State*, 367 Md. 571, 790 A.2d 15 (2002).

against Johnson when he provided authorities information regarding Conyers. (E. 412-14). The charges were contained in a 19-count indictment, arising out of a robbery at a Wendy's, which, if Johnson were convicted on all counts, would result in a 244-year sentence. (E. 413-14). Counsel established that, after testifying in the Conyers case, Johnson pled guilty to one count of conspiracy to commit robbery and the remainder of the counts were dismissed. (E. 414-15). After testifying at Conyers's trial in 1996, Johnson was released with a sentence of time served. (E. 416). On redirect, Johnson clarified that, under his written agreement with the State, the State would recommend a one to six-year sentence on the conspiracy count, leaving Johnson free to ask for a lesser sentence. (E. 418).

Detective Marll, the lead detective in the homicide of Wanda Johnson, who took Johnson's written statement, was called by the State as a rebuttal witness. He testified that on November 23, 1994, he learned that Johnson had contacted the homicide office and asked to speak to someone about the murder investigation of Wanda Johnson. (E. 552). Marll and his partner went to the Detention Center and took Johnson back to the police department, where they obtained a statement from him. (E. 552-53). According to Marll, Johnson did not ask for any favors in return for the information he provided. (E. 553).

The Court of Appeals of Maryland on direct review of the death sentence agreed that the jury was provided a full picture of Johnson. The court observed as follows:

> During the sentencing hearing, and also during the defense's closing statements, the jury was made well aware of the Appellant's theory that Charles Johnson

> was a jailhouse "snitch" who fabricated his conversations with Appellant regarding the Wanda Johnson murder so that he could reduce his own time spent in prison. We can safely assume that the jury took this theory with them into the jury room for deliberations and considered it and any supporting evidence, along with all the other evidence in the case, before rendering its verdict.

Conyers, 354 Md. at 161, 729 A.2d at 925.

At the post conviction hearing, Detective Marll repeated his trial and re-sentencing testimony regarding the interview with Charles Johnson and Johnson's written statement. According to Marll, after Johnson completed his written statement, but before signing it, Johnson asked if there was anything that could be done for him regarding the charges pending against him. (E. 1121).

> And at the time, we said we don't make any deals, we can't make any promises. The only thing we can do is take the statement to the State's Attorney Office, and they can get in touch with your attorney and anything along that line can be done by them. We stay entirely out of it.
>
> At that time, I asked if he would sign the bottom of the statement form, and he said he didn't want to, he didn't feel comfortable signing it, but he said he would put his initials there, and he did, he wrote them on each page in front of us and placed his initials on each line next to the signature block area, and at that time, we were done. He was subsequently taken back over to the detention center.

(*Id.*). Detective Marll testified that no benefits of any kind were provided by the police department to Johnson. (E. 1145).

With respect to Conyers's claim that, contrary to Detective Marll's testimony, Johnson provided information to the police only in exchange for some benefit, the post conviction court stated as follows:

> Based on the evidence presented at the hearing, Charles Johnson willingly provided information to the police with no prearranged agreement or deal. He apparently elected not to sign the written statement he willingly provided in the hope that he could arrange an agreement with the State's Attorney for his testimony at trial. Charles Johnson was telling the truth when he said that "he didn't right out ask for a deal [of the police]." He correctly didn't feel the police could offer a deal. Detective Marll was telling the truth that Charles Johnson didn't ask "for any promises or favors in return for the information" he gave to the police. This is verified by the fact that he did give the information to the police with no agreement or deal.
>
> Charles Johnson did want an agreement in exchange for his "testimony." He knew and/or was told that the police could not accomplish that.
>
> The only evidence which could refute the initial motivation is his subsequent act of securing an agreement to testify for the State in exchange for a benefit for him. This information was provided by the State to all counsel for the Petitioner and was the primary subject of cross-examination.

(App. 139a)(emphasis in original).

A majority of the Court of Appeals of Maryland disagreed with the post conviction court, refusing to recognize a distinction between the initial information Johnson provided to the police without benefit and

Johnson's subsequent agreement to testify at trial in exchange for favorable treatment. (App. 37a-39a). As a result, the Maryland court reached two conclusions: one, that the State violated *Brady* by failing to disclose evidence concerning Johnson's initial request for a benefit after having provided information that was then reduced to writing; and, two, that the State violated *Brady* by failing to disclose Johnson's refusal to sign the written statement. According to the court, nothing was disclosed concerning Johnson's negotiations for a deal. (App. 45a-47a).

The State court majority then went on to find the information it believed to have been suppressed to be both favorable and material. (App. 47a-59a). It was favorable, according to the court, because it deprived the jury of the circumstances leading to consummation of a plea agreement which would provide further impeachment evidence. (App. 49a). It was material under *Brady/Bagley,* according to the court, because Johnson's statement was the most direct evidence of principalship, albeit not the only evidence, and there was a substantial possibility that the outcome would have been different had the withheld information been disclosed. (App. 56a-59a).[2]

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[2] A second *Brady* claim raised by Conyers was that the State failed to provide documentation regarding unsuccessful efforts at verification of details provided by Johnson in his written statement to the police. (App. 14a-15a). Such claim was based on post conviction counsel's belief that not all of the details in Johnson's statement were necessarily verified as true by the police, and that Detective Marll's testimony at re-sentencing stating that they had been was, thereby, false. While the Court of

The dissent maintained that the State fulfilled its *Brady* obligations by providing impeachment evidence that Johnson received benefits for his testimony by way of a favorable plea bargain. (App. 63a). The dissent noted that

> [i]t is almost . . . universally understood that plea

Appeals made pointed comments regarding this issue throughout its analysis of the first *Brady* issue, it did not ultimately rule on it, finding only a *Brady* violation as to the first claim. Although the issue is not before the Court, it should be pointed out that the State court's remarks ignore a crucial fact. At the initial sentencing proceeding, Detective Marll provided a laundry list of the information in Johnson's statements which Johnson could only have learned from Conyers. (E. 238-50). At re-sentencing, defense counsel sought the State's agreement to generalize Marll's opinion. Defense counsel recalled that, during a chambers conference, there was an agreement "to satisfy the interests that I had and to satisfy the interest that the State had in having some evidence to corroborate Charles Johnson's testimony, we agreed to this language." (E. 1031). Thus, Marll's response, when the prosecutor asked whether there was any information given to him by Johnson and verified by the police that was above and beyond what was contained in Conyers's papers, was, based on the defense request, that there was such information and, that the detective was able to verify each and every statement given to the police by Johnson. (E. 554). There was no effort to deceive the jury regarding verification of details of the murders provided by Johnson, but, rather, an accommodation to a defense request to generalize any comment relative to those details.

> bargaining constitutes favors. Additionally, the very use of the general term "bargain" implies a give and take procedure where things are withheld and other things offered; some are accepted, some are rejected. When the jury was informed of the plea agreement, it, impliedly, was informed that a give and take process for Johnson's testimony had been undertaken and been consummated.

(App. 63a). The dissent concluded that the purpose of *Brady* "is to insure that the jury is made aware of the motive for fabrication on the part of the witness, not to mandate that every nuance of the process from which the motive to fabricate originates be remembered and/or disclosed." (App. 64a).

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals of Maryland is warranted for three reasons. First, while clearly holding that a prosecutor has an affirmative duty to disclose the existence of a plea agreement with, or like favorable treatment of, a State witness, this Court in *Brady* and its progeny has never addressed the scope of such disclosure in the context of determining whether the prosecutor suppressed evidence. Beyond stating that the prosecution has a duty to learn of any favorable evidence known to others acting on behalf of the prosecution, and to disclose such to a defendant, but that the obligation under *Brady* is not the same as discovery, this Court has never articulated precisely what a prosecutor must disclose pursuant to *Brady* regarding preliminary negotiations or bargaining with a potential witness by either the police or the prosecutor, and, to the extent it has done so in other

contexts, the state court majority ignored such limitations. Second, the state court's majority opinion conflicts with rulings of other state and federal jurisdictions considering similar *Brady* claims. Third, there are unfortunate public policy ramifications to the Maryland court's expansive reading of a prosecutor's *Brady* obligations. With this case, the Court can articulate whether a prosecutor's duty to disclose under *Brady* extends not only to the existence and terms of a plea agreement with a witness, but to the negotiations leading up to that agreement.

I. This Court Has Not Defined the Scope of *Brady* in the Context of Plea Agreements, and, to the Extent That It Has Limited the Scope in Other Contexts, the State Court Misapplied Such Precedent.

In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. When the reliability of a witness is determinative of guilt or innocence, nondisclosure of impeachment evidence falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Accord United States v. Bagley*, 473 U.S. 667, 676 (1985) (no distinction between exculpatory evidence and impeachment evidence). *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

To establish a *Brady* violation, a defendant must establish one, that the prosecutor suppressed or withheld evidence, two, that the evidence is favorable to the defense, and, three, that the suppressed evidence is material. *Bagley*, 473 U.S. at 674-78. As to the first prong of the *Brady* standard, suppression by the prosecution, this Court has stated that *Brady* principles were not intended "to displace the adversary system as the primary means by which truth is uncovered." *Id.* at 675.

Thus, the prosecution is not required to make a complete accounting to the defense of all background work on a case. *Moore v. Illinois*, 408 U.S. 786, 795 (1972). As Justice Fortas stated in his concurring opinion in *Giles v. Maryland*, 386 U.S. 66 (1967), it is only when the State "has in its exclusive possession *specific, concrete evidence which is not merely cumulative or embellishing* and which may exonerate the defendant or be of material importance to the defense--regardless of whether it relates to testimony which the State has caused to be given at trial--the State is obliged to bring it to the attention of the court and the defense." *Id.* at 100 (emphasis added).

Following this Court's decision in *Brady*, the Court in *Giglio* applied the same fairness principles to impeachment evidence. In *Giglio*, the government failed to disclose to the defendant a promise to a witness that the witness would not be prosecuted if he testified for the government. 405 U.S. at 150-51. The witness's testimony that there was no bargain went uncorrected. *Id.* at 151-52. The Court held that non-disclosure of the government promise, even though the prosecutor making the promise was not the same prosecutor trying the case, deprived Giglio of a fair trial. *Id.* at 154. However, according to the Court, "[w]e do not . . . automatically require a new

trial whenever 'a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" *Id.*

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court defined suppressed information as "information which had been known to the prosecution but unknown to the defense." *Id.* at 103. The Court pointed out that, in considering the *Brady* claim before it, it was not addressing the scope of discovery, but only a defendant's right to a fair trial. *Id.* at 107.

> The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

Id. at 108-09 (footnote omitted). *Accord Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."); *Bagley*, 473 U.S. at 675 n.7 (prosecutor not required to deliver his entire file to defense counsel since "a rule that the prosecutor commits

error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments").

In *Kyles*, which dealt with exculpatory rather than impeachment evidence, the Court acknowledged that the mere fact that a prosecutor knows of favorable evidence unknown to the defense is not, without more, a *Brady* violation. 514 U.S. at 437. However, the Court stated that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437-38. The Court recognized "that police investigators sometimes fail to inform a prosecutor of all they know," but reiterated that procedures can be put in place "to ensure communication of all relevant information." *Id.* at 438 (quoting *Giglio*, 405 U.S. at 154). Further, once learning of arguably favorable material, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 439 (quoting *Agurs*, 427 U.S. at 108). Finally, the Court pointed out that a prosecutor errs only when the non-disclosed information is material. *Id.* at 439.

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. *Accord Kyles*, 514 U.S. at 433-34. Any omission must be evaluated in the context of the entire record and must be significant enough to result in the denial of a fair trial. *Agurs*, 427 U.S. at 112.

The materiality standard relative to impeachment evidence was analyzed most recently in *Strickler v. Greene*, 527 U.S. 263 (1999). The Court noted that it was

not sufficient that any allegedly withheld evidence merely discredit a witness or even that the impeachment could have changed the outcome of the trial. *Id.* at 289. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 290 (quoting *Kyles*, 514 U.S. at 435).

This Court has not considered in the above-cited cases a situation as that presented here, where the prosecution disclosed the fact of a plea agreement with a witness, the terms of the agreement, and the information provided by the witness, and yet is called to task pursuant to *Brady* for not disclosing details of the witness's discussions with the police or subsequent negotiations between the prosecutor and the witness. Surely *Brady*, which simply assures a defendant a fair trial, does not reach so far.

Maryland's highest court erroneously stretched the *Brady/Giglio/Kyles* holdings to apply to a situation where the existence and terms of a plea agreement with a government witness are fully disclosed to a defendant, but the witness's conversation with a police detective and the steps in the negotiations with a prosecutor leading to the plea agreement are not. Contrary to the Maryland court's conclusion, on this record, the prosecution could not disclose evidence which did not exist: there was no request, offer, or promise of favorable treatment prior to the police interview and completion of a seven-page statement.

Having provided the authorities with what he knew to be useful information, Johnson began negotiations for a possible benefit when it came time to sign his statement. He agreed to initial the statement, however, and defense counsel was provided a copy of the initialed statement.

Subsequent negotiations between Johnson and the prosecutor led to a plea agreement with Johnson, the existence and terms of which were fully disclosed to the defense. It was the agreement that constituted favorable treatment, not the negotiations leading to it. Those details were mere embellishment. Further, while a prosecutor has a duty to learn of relevant material potentially disclosable under *Brady*, and appropriate information in police files may constitute such material, it is difficult to see how a police officer's comment to a potential witness meets this definition.

Finally, under the *Agurs* definition of what constitutes suppressed information, i.e., information known to the prosecution, but unknown to the defense, the fact that Detective Marll met with Johnson and the fact that Johnson initialed his statement, rather than signing it, were known to defense counsel. As such, nothing was suppressed. Counsel had the opportunity to question Detective Marll about the meeting and statement, but focused instead on the more critical fact, i.e., that Johnson successfully negotiated a favorable plea agreement in exchange for his testimony against Conyers.

In this case, the prosecution did not fail to disclose evidence of favorable treatment pursuant to *Brady*. The Court of Appeals decision to the contrary is a misapplication of *Brady* principles. It stretches the *Brady* standard far beyond what this Court intended. This case presents the Court with an opportunity to elaborate on the scope of one component in a *Brady* analysis, i.e., whether the prosecution has suppressed *Brady* evidence when it discloses the existence and terms of a plea agreement, but does not disclose details of the negotiations culminating in that agreement.

II. The Decision Below Conflicts With Rulings of Other State and Federal Jurisdictions Considering Similar *Brady* Claims.

The constitutional concern in the *Brady/Giglio* context is what might induce a witness to testify falsely. The motivation to do so arises from a favorable agreement itself, not from the negotiations preceding the agreement. Most recently in *Rubalcada v. State*, 731 N.E.2d 1015 (Ind. 2000), the Indiana Supreme Court considered a situation where the prosecution disclosed before trial the terms of a plea agreement offered to, but not accepted by, a witness who then testified at trial and was cross-examined about the offer and its rejection. *Id.* at 1023-24. Four months after trial, the witness did enter a plea agreement with slightly more favorable treatment than that originally offered. *Id.* at 1024. The defendant's *Brady* complaint was that all of the possible terms of an offer were not disclosed and the jury was unable to weigh the full extent of the witness's motivation. *Id.* at 1023.

The Indiana Supreme Court reaffirmed its recognition of the prosecutor's duty to disclose any agreement with a witness or any promise, grant of immunity, or reward offered in exchange for testimony. *Id.* at 1024. However, the court repeated the following caveats: "The prosecutor's duty of disclosure arises when there is a confirmed promise of leniency in exchange for testimony, but *preliminary discussions are not subject to mandatory disclosure*." *Id.* (emphasis added). Further, hopes for leniency when the State neither confirms nor denies such hopes are not concrete agreements requiring disclosure. *Id.*

Likewise, in *Wright v. State*, 690 N.E.2d 1098 (Ind.

1998), the court recognized the importance of fully disclosing express plea agreements or understandings between the state and witnesses, written or unwritten, but limited this duty to a confirmed promise of leniency in exchange for testimony, not to preliminary discussions. *Id.* at 1113. In *Wright*, the state did not disclose any agreement with a witness and the witness testified that there was no plea agreement in exchange for his testimony, although shortly after that testimony the witness was accorded favorable treatment by way of a plea to a reduced charge. *Id.*

According to the court, an express agreement does not exist if a witness has some hope of leniency which is neither confirmed nor denied, or when that hope and expectation is consummated after the testimony. *Id.* The court held that the witness's hopes, combined with the state's serious consideration of reducing the charges based on the witness's assistance, did not establish an agreement requiring disclosure. *Id.* at 1114. *Accord Sigler v. State*, 700 N.E. 2d 809, 812 (Ind. App. 1998) ("An express agreement exists where there is a confirmed promise of lenience in exchange for that witness's testimony. On the other hand, preliminary discussions need not be disclosed nor is disclosure required where in fact the witness hopes for leniency but the State neither confirms nor denies that hope to the witness."); *Lopez v. State*, 527 N.E.2d 1119, 1129 (Ind. 1988) (preliminary discussions are not subject to disclosure); *Bubb v. State*, 434 N.E.2d 120, 122 (Ind. App. 1982) (prosecutor need not disclose preliminary discussions concerning witness immunity). *See also Carter v. Bell*, 218 F.3d 581, 601-02 (6th Cir. 2000) (where defense knew of plea agreement in exchange for testimony wherein witness would plead to lesser included

offense and receive reduced sentence, and such fact was brought out on cross-examination, prosecution not required to disclose additional evidence of any agreement as to where witness would serve his sentence).

Under the analysis applied by the Indiana courts, there is no *Brady* obligation to provide information relevant to preliminary discussions with a witness not resulting in a pre-testimony plea agreement. Applying that analysis to the instant case, there certainly can be no constitutional requirement to disclose details of preliminary discussions with the police or prosecution resulting in a plea agreement, the existence and details of which are fully disclosed to the defense before trial.

On the federal side, the Eleventh Circuit has attempted to define the scope of the *Giglio* obligation. In *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985)(en banc), *aff'd in part*, 481 U.S. 279 (1987)(not addressing *Giglio* claim), the court considered circumstances somewhat similar to those in the instant case. Offie Gene Evans was a jail cellmate of McCleskey's who testified as a rebuttal witness at trial that McCleskey confessed to being the person who fired a gun that killed a police officer. *Id.* at 883. Evans testified that he was charged with escape and being detained by federal authorities, but denied receiving any favors from the prosecution in exchange for his testimony. *Id.* He also downplayed the seriousness of the federal charge. *Id.*

At a post conviction proceeding Evans again denied being promised anything in exchange for his testimony, although he stated that he was told by one detective that the detective would put in a good word for him. *Id.* It was further established that, after McCleskey's trial, the prosecutor contacted federal authorities to advise them of

Evans's cooperation, and that federal escape charges were subsequently dropped. *Id.* The state court held that the detective's communication with Evans was insufficient to trigger the applicability of *Giglio*. *Id.*

The Eleventh Circuit agreed, noting that this Court "has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness's credibility that they must be disclosed at trial." *Id.* at 884. After referring to the holdings in *Giglio* and *Napue*, the court held that "the detective's promise to speak a word falls far short of the understandings reached in *Giglio* and *Napue*." *Id.* According to the court, it was doubtful that the detective's statement would motivate a reluctant witness. *Id.* Therefore, there was no infringement of McCleskey's due process rights. The court further concluded that, although Evans's testimony added weight to the prosecution's case and was important in several key respects, revelation of the detective's statement would not have affected the jury's assessment of the witness's credibility. *Id.* at 885. *Accord Alderman v. Zant*, 22 F.3d 1541, 1554-55 (11th Cir.) (*Giglio* does not address or require disclosure of all factors which may motivate a witness to cooperate), *cert. denied*, 513 U.S. 1061 (1994).

However, the Eleventh Circuit, to some extent, has also limited its holding in *McCleskey*. *See Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985) (distinguishing *McCleskey* and finding that "[e]ven mere "advice" by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence since it would constitute an informal understanding which could directly affect the witness's credibility before the jury."); *see also Patillo v.*

State, 368 S.E.2d 493, 497-98 (Ga.) (distinguishing *McCleskey* and finding that prosecutor's agreement to inform judge of cooperation of witness was more than offer of police detective to "speak a word," but further concluding that the information was not material and, therefore, not disclosable), *cert. denied*, 488 U.S. 948 (1988).

To the extent there is authority for the proposition that pre-trial, informal promises or suggestions of leniency constitute *Brady* material, the instant case is not such a situation where, with no definitive agreement disclosed pre-trial, a witness was accorded favorable treatment post-trial, suggesting the existence of a tentative pre-trial agreement. Here, the existence of the agreement and its terms were disclosed pre-trial, and thus satisfied *Brady*.

As was the case in *McCleskey*, the initial conversation between Detective Marll and Johnson relating to any favors for Johnson's testimony and Johnson's initialing, rather than signing, his statement likewise fall short of the *Giglio/Napue* type of understanding subject to disclosure. Further, these embellishing details of the plea agreement would not have affected the jury's assessment of Johnson's credibility such that the result of Conyers's trial was unfair, and, therefore, such details were not material.

III. There Are Unfortunate Public Policy Ramifications to the Maryland Court's Expansive Reading of a Prosecutor's *Brady* Obligations.

This Court has made clear that a prosecutor is not required to deliver to the defense everything that might conceivably be of help to a defendant. *See, e.g., Kyles*, 514 U.S. at 437. The reason for the limitation is that such

an obligation "would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Bagley*, 473 U.S. at 675 n.7. A recent case in the Fourth Circuit is instructive in demonstrating the ramifications in broadly interpreting the scope of *Brady* in the context of a prosecutor's obligations.

In *Spicer v. Roxbury Correctional Institute*, 194 F.3d 547 (4th Cir. 1999), Larry Brown, a state witness at Spicer's trial, originally told his attorney that he saw Spicer in the days before and after an assault for which Spicer was charged, although, according to his attorney, Brown did not indicate that he saw Spicer immediately after the assault. *Id.* at 551. The prosecution negotiated a plea with Brown who agreed to testify against Spicer. *Id.* In the prosecutor's subsequent conversations with Brown, Brown stated that he had seen Spicer running from the scene of the assault, and he so testified before the grand jury and at trial. *Id.* at 551-52. Spicer claimed, without success, on state collateral review that the prosecutor's failure to disclose an inconsistency in Brown's statements violated *Brady*. *Id.* at 553-54.

On federal habeas review, the Fourth Circuit panel majority agreed with the district court that Brown's prior inconsistent statement to his attorney that he did not see Spicer on the day of the assault, which was contrary to his testimony at trial that he did see Spicer that day, was impeachment evidence subject to disclosure under *Brady*. *Id.* at 557. According to the panel majority, the prosecutor recognized the distinction between what was told to him by Brown's attorney and what Brown himself said, but "was indifferent to it because he was skeptical of the reliability of Brown's attorney's version." *Id.* at 558. Although agreeing that such a decision was "logical and

proper in carrying out the adversarial part of the prosecutor's responsibilities," the panel majority believed that under *Brady*, it should, nonetheless, have been disclosed. *Id.* at 558. In so concluding, the panel majority attempted to limit the scope of its holding, emphasizing that it was not holding "that the prosecutor is obligated to disclose potentially exculpatory material contained in the back-and-forth hypothesizing that commonly occurs during plea negotiations between the prosecution and defense attorneys." *Id.*

One panel member filed a strong dissent to the majority's conclusion, referring to the majority's holding as "an unprecedented expansion of *Brady* and the unwarranted issuance of the Great Writ." *Id.* at 563. The dissent pointed out that it was not Brown's statements that were inconsistent, but Brown's attorney's proffer as to what Brown could offer and Brown's subsequent grand jury and trial testimony. *Id.* at 565. Brown's statements to the prosecutor, to the grand jury, and at trial were consistent. *Id.* at 564. According to the dissent, "[p]roffers by counsel attempting to negotiate a plea, immunity, or other benefit for their clients are, by their very nature, unreliable for ascertaining specific facts." *Id.* at 565. The dissent characterized the plea process as resembling "a poker game, rife with understatement, bluff, and bluster." *Id.* at 566. According to the dissent, plea negotiations often result from informal, impromptu contacts. *Id.* To impose a duty on a prosecutor to scrutinize such contact in order to meet the majority's view of *Brady* made no sense to the dissent. *Id.* at 567. Further, Spicer's attorney knew before trial that Brown's credibility was suspect and had access to Brown's attorney. *Id.* at 568. On these facts, the dissent could find

no *Brady* violation, and warned of the negative impact on plea negotiations if it were otherwise. *Id.* at 568-70.

A prosecutor's duty is to be on the alert for and to disclose exculpatory evidence, but *Brady* does not, and should not, require a prosecutor to ascertain the details of verbal sparring between the police and a potential witness or to scrutinize the prosecutor's own negotiations with a witness. Further, there can be no *Brady* violation if defense counsel knows or reasonably should know of potentially exculpatory or impeaching information and fails to exercise reasonable diligence to exploit it.

In the instant case, Johnson negotiated a plea for himself, the terms of which were fully disclosed to the defense. It was not the prosecutor's responsibility once he negotiated a plea and disclosed that information to Conyers's attorney to search out from either Johnson or the police some detail of the negotiations that might be perceived as favorable to Conyers. Such information, if it existed, was equally available to Conyers through reasonable diligence. Public policy dictates that a prosecutor's responsibilities should not be read as broadly or far-reaching as mandated by the Maryland court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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May, 2002

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 26

September Term, 2001

CLARENCE CONYERS, JR.

v.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Raker
Wilner
Cathell
Harrell
Battaglia
JJ.

Opinion by Harrell, J.
Wilner and Cathell, JJ. dissent

Filed: February 5, 2002

This is an appeal by Clarence Conyers, Jr. (Petitioner) from the denial by the Circuit Court for Wicomico County of post conviction relief in his capital case.[1] *See* Maryland Code (1957, 1996 Repl. Vol., 2000 Supp.), Article 27, §§ 645A-J (Maryland's Uniform Post Conviction Procedure Act),[2] and Maryland Rules 4-401 through 4-408,[3] and 8-306.[4] This is the third time Petitioner has sought this Court's review regarding the convictions and sentences in this matter.

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[1] The petition for post conviction relief arose out of *State v. Conyers*, Case Nos. 96CR0458 and 96CR0460 in the Circuit Court for Wicomico County. Charges were filed originally against Petitioner in the Circuit Court for Baltimore County because the murders occurred in Baltimore County. The case was transferred to the Circuit Court for Wicomico County for trial.

[2] Maryland's Uniform Post Conviction Procedure Act, Maryland Code (1957, 1996 Repl. Vol., 2000 Supp.), Article 27, §§ 645A-J, provides for and regulates the post conviction proceedings of certain persons who have been convicted of crimes.

[3] Maryland Rules 4-401 through 4-408 specify the procedures to petition for post conviction relief.

[4] Maryland Rule 8-306 applies to appellate review in the Court of Appeals in capital cases, including application for leave to appeal from a judgment granting or denying relief in a post conviction proceeding.

In January 1996, following a jury trial in the Circuit Court for Wicomico County, Petitioner was convicted, with respect to the victim, Wanda Johnson, of premeditated murder, felony murder, first-degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, robbery, attempted robbery, and use of a handgun in the commission of a crime of violence. In the same proceeding, Petitioner was convicted of premeditated murder of, and use of a handgun in the commission of a felony against Lawrence Bradshaw, his alleged accomplice in the crimes against Ms. Johnson. The same jury sentenced Petitioner to death for the murder of Ms. Johnson.[5] Petitioner received life without possibility of

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[5] Pursuant to the provisions of Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 413 (concerning the sentencing procedure upon a finding of guilty of first degree murder), the jury found, beyond a reasonable doubt, that Petitioner was a principal in the first degree in the murder of Ms. Johnson, and that the murder was perpetrated in the course of committing or attempting to commit a robbery. At least one or more, but fewer than all, of the jurors found, by a preponderance of the evidence, the existence of two non-statutory mitigating circumstances, specifically, family ties and a loving family. Finding, by a preponderance of the evidence, that the aggravating circumstance outweighed the mitigating circumstances, the jury unanimously determined the sentence to be death.

parole for the murder of Lawrence Bradshaw.[6]

In the initial direct appeal, this Court reversed the burglary conviction, affirmed the murder and other convictions, and vacated the death sentence, finding with regard to the latter that the trial court committed reversible error in admitting a portion of the pre-sentence investigation report referring to Petitioner's prior juvenile charges that had not resulted in a finding of delinquency. *See Conyers v. State*, 345 Md. 525, 575, 693 A.2d 781, 805 (1997) ("*Conyers I*"). The case was remanded to the Circuit Court for Wicomico County for a new sentencing proceeding relating solely to the murder of Ms. Johnson.

In January 1998, a new capital sentencing proceeding was conducted before a jury in the Circuit Court for Wicomico County.[7] Petitioner, represented by different trial counsel, was sentenced again to death for the murder of Wanda Johnson.[8] On the second direct appeal, this

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[6] The State did not seek the death penalty for the murder of Mr. Bradshaw.

[7] Unless indicated otherwise, all further references to the sentencing proceeding in this opinion will be to the second sentencing proceeding in January 1998.

[8] In accordance with the provisions of Md. Code (1957, 1996 Repl. Vol., 1998 Supp.) Art. 27, § 413, the jury found, beyond a reasonable doubt, that Petitioner was a principal in the first degree in the murder of Ms. Johnson and that the murder was committed in the course of committing or attempting to commit a robbery. The jury did not find, by a preponderance of the evidence, the

(continued...)

Court affirmed. *See Conyers v. State*, 354 Md. 132, 200, 729 A.2d 910, 946, *cert. denied*, 528 U.S. 910, 120 S. Ct. 258, 145 L. Ed. 2d 216 (1999) ("*Conyers II*"). The U.S. Supreme Court denied further review. *See Conyers v. Maryland*, 528 U.S. 910, 120 S. Ct. 258, 145 L. Ed. 2d 216 (1999).

On 7 March 2000, pursuant with the provisions of Maryland's Uniform Post Conviction Procedure Act, Md. Code (1957, 1996 Repl. Vol., 2000 Supp.), Art. 27, §§ 645 A-J and Md. Rules 4-401 through 4-408, and 8-306, Petitioner, through yet different trial counsel, filed a petition for post conviction relief[9] in the Circuit Court for Wicomico County, alleging, among other things, due process violations, ineffective assistance of counsel, and various trial court errors. After an evidentiary hearing, the Circuit Court[10] denied Petitioner post conviction relief by an Order dated 30 January 2001. The court found Petitioner's allegations of due process violations unsupported by the evidence. As to the ineffective

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(...continued)
existence of any mitigating circumstances. The jury unanimously sentenced Petitioner to death.

[9] Supplemental amended petitions were later filed. For purposes of this Opinion, the original and amended petitions will be considered as a whole and collectively referred to as "petition."

[10] Although the same judge presided over all trial court proceedings prior to the filing of the post conviction petition, a visiting judge presided over the post conviction proceedings.

assistance of counsel claim, the court concluded Petitioner's assertions were without merit. The court dismissed Petitioner's contentions of trial and sentencing court errors, finding the actions to be proper. Finally, the court rejected Petitioner's challenges to Maryland's death penalty procedure and method of execution.

On 28 February 2001, pursuant to the provisions of Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 645-I and Md. Rule 8-306, Petitioner filed with this Court an application for leave to appeal denial of post conviction relief. The application was granted on 11 May 2001. We shall reverse the Circuit Court's denial of Petitioner's petition for post conviction relief and remand this case to the Circuit Court for Wicomico County for a new trial.

Factual Background

Prior to the recitation of the issues presented for our consideration here, we set out the underlying facts regarding Petitioner's convictions, as recounted by the post conviction hearing judge.[11]

> At approximately 9:35 p.m., on Friday, October 21, 1994, Petitioner's estranged girlfriend, Monica Wilson, went to visit her

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[11] The statement of facts concerning the crime and subsequent events recounted in the post conviction court's Memorandum Opinion was taken from *Conyers v. State*, 354 Md. 132, 143-47, 729 A.2d 910, 915-18, *cert. denied*, 528 U.S. 910, 120 S. Ct. 258, 145 L. Ed. 2d 216 (1999) ("*Conyers II*").

mother, Wanda Johnson, at the home Ms. Johnson shared with her husband, Elwood Johnson. Ms. Wilson had just spoken with her mother at 9:00 p.m. that evening, and her mother had agreed to babysit for Ms. Wilson's son. Arriving with Ms. Wilson at the Johnson home was her cousin, Carla Clinton.

As the two women approached the Johnson home, they saw someone looking outside through a second floor bedroom window. The women knocked on the door, and, as they waited for someone to open it, they saw through a window a man walking down the stairs. The women saw this man turn off the lights inside the house and duck down as if to avoid being seen. The two women walked to a back door and knocked on it. The women heard sounds of a struggle, described as a "commotion," "tussling" and "fighting," coming from inside the house. Then Ms. Johnson began to scream, and a window on the second floor broke over the women's heads.

The two women fled to the home of a relative who lived nearby and called the police. On the way to the relative's house, Ms. Wilson noticed a car parked across the street from her mother's house. The car resembled one that Petitioner sometimes borrowed from his former girlfriend and mother of his child, Debra Meyers. Upon returning to the Johnson home, Ms. Wilson was informed by the police that her mother was dead.

There were no signs of forced entry into the Johnson home. Wanda Johnson's body was found in the master bedroom. She had been shot

three times in the head, once in the back, and once in the arm. It was Ms. Johnson's custom to keep a small amount of money in her wallet. Furthermore, when Ms. Wilson spoke to Ms. Johnson earlier that evening, at approximately 9:00 p.m., Ms. Johnson said that she had twenty dollars. Ms. Johnson's open wallet was found atop her dresser in the master bedroom; there was no money in the wallet. In the den, a door to a closet had been forced open, revealing a safe. The closet door had a hasp and a lock on it for security, but the hasp and lock had been pried out of the door jamb to gain access to the closet. Pulling the hasp out of the door jamb had caused splinters to fall on the floor around the closet. The safe inside the closet was closed. Mr. Johnson opened the safe the day after his wife's murder; it contained fifteen dollars.

The next day, Ms. Clinton worked with a police artist on a sketch of the man she had seen on the staircase inside the Johnson home the evening before. Ms. Wilson was asked to look at the sketch that had been made based on Ms. Clinton's description. Petitioner, who had come to the police station to keep Ms. Wilson company, took the sketch away before Ms. Wilson had a chance to see it, telling the police that the sketch would upset her. When Ms. Wilson finally had a chance to see the police sketch, she did not immediately identify Lawrence Bradshaw as the man depicted in the sketch. She made a photo identification of another man, who was arrested and incarcerated for a brief time as a result. Ms.

Wilson later agreed, however, that the police sketch looked like Lawrence Bradshaw.

Shortly after 1:00 a.m. on October 23, 1994, approximately 27 hours after the murder of Ms. Johnson, Lawrence Bradshaw was shot in the 4300 block of McDowell Lane. This street is located in the Lansdowne area, near Debra Meyers's home. Mr. Bradshaw had been shot three times in the head, once in the back, once in the arm, and once in the finger. Mr. Bradshaw was taken to Shock Trauma, where he died the following day. *Conyers I*, 345 Md. at 534-36, 693 A.2d at 785-86.

As to Johnson, Petitioner was convicted of premeditated murder, felony murder, first-degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, robbery, attempted robbery, and use of a handgun in the commission of a crime of violence, and sentenced to death. With respect to Bradshaw, Petitioner was found guilty of premeditated murder and use of a handgun in the commission of a crime of violence, and sentenced to life without parole.

On appeal, the Court of Appeals found the evidence was insufficient to sustain Petitioner's conviction for the burglary of Johnson's home, but sustained the remaining convictions. Regarding sentencing, the Court of Appeals held that certain portions of Petitioner's juvenile record that were contained in the pre-sentence investigation (PSI) report should not have been presented to the jury because the material was considered "inflammatory and highly prejudicial."

Conyers I, 345 Md. at 563, 693 A.2d at 799. Consequently, Petitioner was granted a new sentencing hearing.

At the second capital sentencing hearing,[12] during the State's case, Charles Johnson (no relation to the victim, Wanda Johnson, or her husband) testified that while he was Petitioner's cellmate[13] at the Baltimore County Detention Center in October-November of 1994, Petitioner discussed the robbery at [Wanda] Johnson's home. Charles Johnson stated Petitioner told him that he and a person named "Molek"[14] went to Wanda Johnson's house and Petitioner went upstairs to rob a safe. Charles Johnson testified:

> "During the robbery, someone came to the door. At that point, Ms. Johnson yelled out . . . her daughter's name or something of

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[12] Charles Johnson's testimony during the sentencing stage was essentially a reiteration of his earlier testimony given during the guilt/innocence phase of Petitioner's January 1996 trial.

[13] Charles Johnson was awaiting trial on charges of armed robbery of a Wendy's Restaurant at the time he was Petitioner's cellmate.

[14] Debra Meyers, Petitioner's former girlfriend and the mother of his child, testified during the guilt/innocence phase of the January 1996 trial that Mr. Bradshaw was introduced to her as "Molek" by Petitioner upon arriving at her home in the early morning hours of 23 October 1994, shortly before Mr. Bradshaw was shot.

> that nature. And Clarence panicked, because, I guess, they would recognize him is what he said, and as a result, he wound up shooting Ms. Johnson."

Charles Johnson went on to state that Petitioner told him that while both he and "Molek" were upstairs at first, when they heard noise, "Molek" ran downstairs. After [Wanda] Johnson was shot, "Molek" ran but Petitioner waited until no one was outside before he left.

Wanda Johnson's husband, Elwood Johnson, testified that Petitioner was a frequent visitor to their home. He also described the layout of the home, providing specific details about a spare bedroom that contained a safe in a closet. The safe, which contained personal papers and petty cash, had a combination lock and the closet was secured with a lock and hasp. Mr. [Elwood] Johnson stated that earlier in the day, the safe and closet were in normal condition but when he returned after the shooting the closet had been forced open and the hasp was broken. Furthermore, his wife's wallet was lying open on a dresser in their bedroom, which normally would have been inside her purse and placed in a cabinet or dresser drawer.

Wilson, the victim's daughter, basically recapped her trial testimony, describing her past relationship with Petitioner, her arrival at her mother's home with her cousin and son, hearing noise and her mother's screams, fleeing the scene and going for help down the street, and finally being informed of her mother's murder. Wilson

also testified to Petitioner's efforts to prevent her from seeing the composite sketch of Bradshaw that her cousin helped develop and to keep her from reading or viewing any news related to the murder. Wilson stated Petitioner knew about the safe in her parents' spare bedroom and that he was aware her mother was not normally home on Friday evenings. Wilson knew that Petitioner owned a .38 caliber pistol, the type of weapon used to kill her mother.

Carla Clinton, Wilson's cousin who was with her at the crime scene, also repeated her trial testimony as to going to the Johnson house, seeing someone downstairs, hearing noise and her aunt's screams from inside the house, and finally assisting the police in the development of a composite sketch of the person she saw in the house.

Also during the State's case, a stipulation was presented to the jury regarding the recovered cartridges and the fact that they were all fired from a .38 caliber handgun. In addition, Victoria Gibson, the victim's sister, testified as a victim impact witness, describing her sister's nature and personality and the warm relationship she had with her entire family. Furthermore, Petitioner's PSI report, which was redacted to the satisfaction of both the State and defense, was introduced into evidence.

During the defense's case, Arthur Rogers testified that he was incarcerated with Charles Johnson during October 1994 and at one point he discovered Johnson "rifling through my charging

documents." Ventura McLee testified that he was incarcerated in October 1994 with Petitioner and Charles Johnson. During this period, Charles Johnson showed McLee indictment papers, police reports, and photographs relating to Petitioner's case. Timothy Wren testified that while he was incarcerated with Charles Johnson during August and October 1994, Charles Johnson told him that he had seen Petitioner's charge papers, that he had heard Petitioner talk about the case in his sleep, and that Petitioner had confessed his guilt. Eric Spencer, who resided in the cell next to Charles Johnson and Petitioner in October 1994, testified that he never heard Petitioner discussing his case with Charles Johnson.

Testifying as mitigation witnesses were Petitioner's parents, Clarence Conyers, Sr., and Eleanor Conyers, as well as Reverend William Felder. Petitioner exercised his right of allocution, stating that he "had no involvement in this crime whatsoever."

Additional facts will be provided as relevant to the respective issues we shall consider.

Petitioner's Issues

Petitioner asserts two instances of prosecutorial misconduct based upon the State's failure to disclose material impeachment evidence, that he was entitled to

receive, concerning an important State's witness,[15] Charles Johnson (no relation to the victim, Wanda Johnson). First, Petitioner contends that the State failed to disclose, at trial or sentencing, evidence that Johnson sought a benefit relative to a pending charge when he met with police on 23 November 1994,[16] at which meeting he provided incriminating information on Petitioner. Moreover, Petitioner asserts, the State persisted in its deception regarding the complete circumstances surrounding Charles Johnson's coming forward by presenting at sentencing, without correction, the false testimony of Johnson, and corroborating testimony of Detective Phillip Marll, regarding the absence of such solicitation by Johnson, and then misled the jury in its closing arguments concerning Johnson's unselfish motives in coming forward and his credibility as a witness. Second, Petitioner contends that the State failed to provide documentation contained in its files of unsuccessful efforts by the police to verify the accuracy of a number of statements Johnson provided the police during the 23 November 1994 meeting, and instead offered Detective

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[15] Charles Johnson was the State's key witness in the sentencing proceeding regarding Petitioner's principalship in the murder of Ms. Johnson.

[16] Charles Johnson met with police for the first, and only, time on 23 November 1994. The meeting was held at Johnson's request. Detectives Phillip Marll and James Tincher conducted the police interview.

Marll's false testimony at sentencing that the police had verified "each and every" statement made by Johnson.[17]

Petitioner argues that the lack of disclosure, aggravated by the presentation of false testimony, in each instance, was a violation of Petitioner's due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and its progeny.[18] Petitioner also asserts an ineffective assistance of counsel claim citing numerous instances of deficiencies of trial and sentencing counsel, trial court error, and additional claims of error. Petitioner presents a total of nineteen (19) questions for our review.[19] We have consolidated them into fourteen

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[17] The State emphasized in its closing argument at sentencing that "all" of Johnson's statements had been verified by the police.

[18] We shall refer to this in the opinion as the "*Brady* claims." In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d 215.

[19] Ordinarily, we would simply repeat the questions presented or arguments in Petitioner's brief. We are unable to do that here, with complete confidence, because Petitioner framed the issues in a most confusing way. In Petitioner's brief, in the Table of Contents, he frames

(continued...)

(14) questions, grouped according to whether they pertain to the guilt/innocence phase, the sentencing proceeding, or the post conviction hearing.

Guilt/Innocence Phase Errors

I Did the post conviction court err in finding that the State did not deny Petitioner due process in the guilt/innocence phase of trial by withholding certain material, impeachment evidence pertaining to the testimony of its key witness, Charles Johnson, in conjunction with the presentation of false testimony by and about Charles Johnson relative to such evidence, along with the State's misleading closing arguments commending Mr. Johnson's credibility, in violation of *Brady*?

II Did the post conviction court err in concluding that Petitioner was not denied the effective assistance of counsel at the guilt/innocence phase of trial with respect to the testimony of Charles Johnson?

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[19](...continued)
arguments, numbered one (1) through twelve (12), some with subparts (a total of nine (9) subparts, two (2) of which have three (3) sub-subparts each). In the main body of the brief, however, he frames nineteen (19) Questions Presented. For clarity of presentation in this opinion, we express our understanding of a melding of Petitioner's issues.

III Did the post conviction court err in concluding Petitioner was in no other respect deprived of the effective assistance of counsel at the guilt/innocence phase of trial?

IV Did the post conviction court err in finding that Petitioner suffered no prejudice from the omission of certain jury instructions at the guilt/innocence phase of trial?

V Did the post conviction court err in finding that cumulative ineffective assistance of counsel error does not require a new trial?

VI Did the Circuit Court properly deny Petitioner's claim that the State's summations at the guilt/innocence phase of trial violated due process where the State implied in the trial summation that the jurors should be afraid of Petitioner?

VII Should this Court consider three claims denied by the post conviction court, which were included solely to preserve the record for future federal review?

Sentencing Errors

VIII Did the post conviction court err in finding that the State did not deny Petitioner due process at sentencing by withholding certain material, impeachment evidence pertaining to the testimony of its key witness, Charles Johnson, in conjunction with the presentation of false testimony by and about Charles Johnson relative to such evidence, along with the State's misleading closing arguments

commending Mr. Johnson's credibility, in violation of *Brady*?

IX Did the post conviction court err in concluding that Petitioner was not denied the effective assistance of counsel at sentencing with respect to the testimony of Charles Johnson?

X Did the post conviction court err in concluding Petitioner was in no other respect deprived of the effective assistance of counsel at sentencing?

XI Did the post conviction court err in finding that the sentencing form properly consolidated the jury's finding regarding the robbery and attempted robbery aggravators into one item where the evidence of the robbery predicate was legally sufficient to find the defendant guilty?

XII Did the post conviction court err in finding that the Supreme Court's recent holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), had no applicability to the present case?

XIII Did the post conviction court err in finding that cumulative ineffective assistance of counsel error does not require a new sentencing?

Post Conviction Error

XIV Did the post conviction court improperly quash Petitioner's subpoena to the Department of Corrections to obtain testimony and documents pertaining to

> methods of execution where such subpoena was essential to proving that Maryland's lethal injection method of execution is cruel and unusual punishment violative of the Eighth Amendment?

The State's Waiver Argument

As a preliminary matter, the State asserts that, pursuant to the provisions of Md. Code (1957, 1996 Repl. Vol., 2000 Supp.), Art. 27, § 645A(c)(2),[20] Petitioner's

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[20] Article 27, § 645A(c) concerns matters of waiver under Maryland's Uniform Post Conviction Procedure Act, and provides that:

> (c) *When allegation of error deemed to have been waived.*— (1) For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not the petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be

(continued...)

Brady claims (I and VIII) were waived, having been raised for the first time in the post conviction proceeding. Petitioner counters that, in fact, it is the State's waiver argument that has been waived in accordance with Md. Rule 8-131(a),[21] as it was not presented to the Circuit

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[20](...continued)
excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.

(2) When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

[21] Maryland Rule 8-131 concerns the scope of appellate review. Rule 8-131(a) provides in pertinent part,

[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in

(continued...)

Court during the post conviction proceedings, and, accordingly, was not addressed by the hearing judge in his opinion of 30 January 2001. Moreover, Petitioner asserts the State's waiver claim fails on its merits, as the factual predicate for the State's violations did not become apparent until Detective Marll's testimony during the evidentiary hearing on the post conviction petition, at which point Petitioner filed a timely supplement to his amended petition for post conviction relief to include the newly discovered *Brady* claims.[22] We agree with Petitioner's arguments.

A. Factual Background

Petitioner's claims of *Brady* violations relate to the examination of Charles Johnson, and related corroboration testimony of Detective Marll, stemming from Johnson's meeting with Detectives Marll and Tincher on 23 November 1994. During that meeting, Johnson provided the detectives with non-public information concerning the murders of Ms. Johnson and Bradshaw that allegedly only the murderer would know. Johnson's statement indicated

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[21](...continued)
or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

[22] Petitioner's counsel filed a Supplement to Amended Petition for Post Conviction Relief on 26 October 2000.

that he had not been promised any favors in exchange for the information in his statement. The statement was silent as to whether he asked for any favors.

On 14 December 1994, Petitioner's then trial counsel asked the State to provide all *Brady* material.[23] The State complied on 9 February 1995 by making available to Petitioner its file containing allegedly all relevant documents,[24] stating that "[a]t the present time, there is no information known to the State which is exculpatory, in any manner to the Defendant." Likewise, in the State's 11 December 1995 response to Petitioner's motion to compel the State to comply with Md. Rule 4-263(a)(1),[25] the State

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[23] Specifically, Petitioner requested in his demand for discovery that "the State's Attorney disclose to the Defendant any material or information which tends to negate the guilt of the Defendant as to the offense charged or would tend to reduce the punishment therefor, or would be of assistance in impeaching the credibility of a State witness."

[24] The State purported to provide "open file" discovery to Petitioner's counsel. While the precise definition of an "open file" policy may vary by jurisdiction, it is clear in this case that the prosecutor's use of the term meant to communicate that no discoverable matters were concealed in any way from Petitioner's counsel, noting that the State had provided Petitioner "a copy of the entire file of the State excluding internal documents and work product notes."

[25] Maryland Rule 4-263(a)(1) concerns discovery

(continued...)

reiterated its open file policy, explaining that "[t]he State has not put itself even in the position of determining what could be exculpatory," and furthermore claiming that its actions taken in this regard were "well beyond the discovery requirements of Maryland Rule 4-263." None of the documents in the State's files indicated that Johnson at any time sought a personal benefit for his cooperation, nor was there documentation indicating that there had been any unsuccessful attempts by the police to verify the information Johnson provided them at the 23 November 1994 meeting.

Charles Johnson first testified on 18 January 1996 at a suppression hearing regarding Petitioner's alleged jailhouse confession to Johnson. Johnson stated that his intention in contacting the police initially was to speak with them on Petitioner's behalf.[26] When asked if he

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[25](...continued)
in circuit court, and in pertinent part states: "(a) **Disclosure Without Request**. Without the necessity of a request, the State's Attorney shall furnish to the defendant: (1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged . . . ."

[26] Specifically, Johnson testified:

> And I did tell [Petitioner] that I would speak with the officers more or less, it was more or less in his favor . . . if he didn't intend on [murdering Wanda Johnson], we were under the assumption that, you know, it wasn't a

(continued...)

requested a deal for the information, Johnson responded that he "didn't right out ask for a deal. . . . [He] didn't feel as though [the police] could offer [him] a deal." Petitioner's counsel nonetheless challenged Johnson's motive in contacting the police, relying on his known 13 January 1995 plea agreement with the State on a pending robbery charge. Johnson responded:

> [T]he only thing they have done is, well, I was found guilty on the charge that I was charged with, and as far as I know, I haven't been sentenced to anything, but I believe that my armed robbery charge was reduced to a robbery, because I wasn't involved in the robbery.[27]

Similarly, at trial, Johnson testified that his sole motivation in contacting the police was to "speak on [Petitioner's] behalf that [Petitioner] didn't intentionally go in there with the intent or premeditation to kill Miss Johnson, that it happened because he panicked . . . ." At the sentencing proceeding, Johnson denied Petitioner's counsel's accusation that he intended, from the outset, to lie about Petitioner's alleged confession in order to seek a deal on his pending charges.

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[26](...continued)
premeditated murder, that it happened as a result of panic or something of that nature.

[27] Johnson's robbery charge stemmed from his participation as the 'getaway' driver in the Wendy's robbery. *See supra* note 13. His testimony was that he was not present inside the Wendy's Restaurant at the time of the hold-up.

Detective Marll denied at trial that any inducements had been offered to Johnson in exchange for the information. On direct examination, the prosecutor pointedly asked Detective Marll about any agreement between Johnson and the police:

> [State:] Had you or Detective Tincher made any promises to Mr. Johnson concerning any information that he would provide you?
>
> [Detective Marll:] No, sir, we did not.

During Petitioner's sentencing hearing on 27 January 1998, Detective Marll was questioned on direct examination by the State about his interview with Johnson:

> [State:] [D]uring the course of your conversations with [Charles Johnson] and then obtaining a written statement from Mr. Johnson, did he at any time ever ask you for any promises or favors in return for the information he was giving you?
>
> [Detective Marll:] No, sir, he did not.

Detective Marll also testified that the police had verified "each and every" non-public statement that Johnson had provided them at the meeting.

In its initial closing argument at trial, the State argued Johnson's credibility as a witness to the jury and his altruistic motives in contacting the police:

> Mr. Johnson told us the truth. . . . he came in here and told the truth because it was the right thing to do.

In the State's rebuttal closing, the prosecutor again emphasized Johnson's credibility as a witness, and reinforced the fact that he had no deal when he provided the police with his statement. The prosecutor stated:

> [Charles Johnson] walked in here and said the truth, he complied with his plea agreement. . . . he's telling you the truth.
>
> [I]t's untrue that anyone went to Charles Johnson and said, hey, let's cut you a deal so you can tell us some info. No, Charles Johnson went to the police and gave them information about Clarence Conyers. And there was no deal when he told the police, November the 23rd of 1994 he gave them a seven-page statement about what he knew and what Clarence Conyers had told him. No deals at that time. He told them what he knew.

In the sentencing phase, the State commented again on Johnson's credibility as a witness, noting that Johnson's statements were "all true. . . . all accurate," and that he "came in [to court] and told [the jurors] the truth . . . ."

Petitioner's counsel nonetheless argued, at both trial and sentencing, that Johnson was simply a lying jailhouse snitch, motivated by self-interest in obtaining his subsequent plea agreement with the State regarding his robbery charges. Petitioner underscored the benefit Johnson received from the State, which allowed him to reduce a potential, maximum jail term of 244 years on the nineteen count indictment for robbery, to a recommended sentence of one to six years, for, *inter alia,* his guilty plea to a one count misdemeanor charge of conspiracy to commit robbery, and his agreement to testify "truthfully" at Petitioner's trial.[28]

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[28] Charles Johnson was indicted on nineteen counts stemming from his involvement in the robbery of a

(continued...)

While Johnson's testimony was addressed by this Court in other contexts in the two prior direct appeals,[29]

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[28](...continued)
Wendy's Restaurant. The charges included four counts of robbery, four counts of robbery with a deadly weapon, one count of conspiracy to commit robbery with a deadly weapon, one count of conspiracy to commit robbery, four counts of assault, one count battery, two counts of handgun violations, one count possession of a handgun, and one count theft. On 13 January 1995, Johnson signed a plea agreement with the State in which he agreed to plead guilty to a misdemeanor charge of conspiracy to commit robbery, for which the State would *nol pros* the balance of the charges and recommend a sentence of one to six years in accordance with sentencing guidelines for that crime. An additional term of the agreement required Johnson to "testify truthfully" and completely at Petitioner's trial as well as against his co-defendant on the robbery charges. Johnson ultimately served eighteen months at the Baltimore County Detention Center, and was released, for time served, two days after testifying at Petitioner's trial.

[29] For example, this Court, in *Conyers II*, discussed whether Detective Marll's testimony, that he "knew upon hearing [certain statements] from [Charles] Johnson to be truthful . . . ," was improper opinion testimony as to the credibility of Johnson as a witness. *Conyers II*, 354 Md. at 153, 729 A.2d at 921. This Court held that Detective Marll was not offering an opinion as to Johnson's (continued...)

Petitioner never raised there a claim relative to the State's failure to disclose potential impeachment evidence concerning Johnson or the State's use of assertedly not fully accurate testimony.

On 2 October 2000, Detective Marll again testified at the post conviction hearing about his 23 November 1994 meeting with Johnson. On this occasion, however, Detective Marll indicated that indeed Johnson had queried the detectives about a possible deal. When Detective Marll informed Johnson that the police did not have the authority to commit to a deal, but would refer his inquiry to the State's Attorney's office, Johnson declined to sign his written statement, electing instead merely to initial the pages. Detective Marll also revealed, for the first time, that several statements Johnson provided the police during the 1994 meeting either were disproved subsequently by the police or were found by them to be unverifiable.

On 26 October 2000, Petitioner filed a timely supplement to the amended petition for post conviction relief raising, for the first time, the claim that the State denied Petitioner due process, and specifically, that (a) the State failed to disclose that Johnson had requested a benefit, that he refused to sign his statement absent a commitment to receive a benefit, and that Detective Marll

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[29](...continued)
credibility as a witness, rather he was testifying as to the results of the verification efforts by the police regarding the information Johnson provided police concerning Petitioner's involvement in Wanda Johnson's and Bradshaw's murders. *Conyers II*, 354 Md. at 154, 729 A.2d at 921.

agreed to pass along Johnson's request to the State's Attorney's office; (b) the State failed to correct Johnson's and Detective Marll's prior testimony denying that Johnson initiated an inquiry regarding receipt of a benefit for his cooperation at both the trial and sentencing proceedings; (c) the State failed to provide to the defense documentation in its possession indicating that there had been any unsuccessful attempts by the police to verify the non-public information Johnson provided in his 1994 meeting with police; and, (d) the State failed to correct Detective Marll's sentencing testimony that he had verified "each and every" non-public statement made by Charles Johnson during the 1994 meeting.

Petitioner's claims of *Brady* violations were addressed and argued on the merits in Petitioner's Memorandum of Law Supporting Post Conviction Relief, filed 4 December 2000, and the State's responsive Memorandum of Law Opposing Post Conviction Relief, dated 21 December 2000. The State did not argue waiver of the *Brady* claims during the post conviction proceedings, and, accordingly, the hearing judge did not address waiver in his opinion of 30 January 2001. The State first raised the waiver claim in its Response in Opposition to Application for Leave to Appeal from Denial of Post Conviction Relief in a Capital Case, filed with this Court on 19 April 2001.

B. Analysis

Ordinarily, an argument not raised in the proceedings below is not preserved for appellate review. *See* Md. Rule 8-131(a). *See also Ware v. State*, 360 Md. 650, 692-93, 759 A.2d 764, 786 (2000) (holding that appellant's argument relating to the inadequacy of a jury instruction

was waived where there had been "no timely objection" in the lower court), *cert. denied*, 531 U.S. 1115, 121 S. Ct. 864, 148 L. Ed. 2d 776 (2001); *Conyers II*, 354 Md. at 148, 729 A.2d at 918 (acknowledging that Md. Rule 8-131(a) limits appellate review to those issues "raised in or decided by the trial court"); *Walker v. State*, 338 Md. 253, 262, 658 A.2d 239, 243 (1995) (stating that "[W]e ordinarily will not review an issue that was not presented to the trial court."); *State v. Bell*, 334 Md. 178, 187, 638 A.2d 107, 112 (1994).

This Court, in limited circumstances, however, may review an argument not made and preserved in the lower court. *See Bell*, 334 Md. at 188-89, 638 A.2d at 113 (noting that use of the word "ordinarily" contemplates circumstances where appellate review of issues not previously raised is appropriate); *Richmond v. State*, 330 Md. 223, 236, 623 A.2d 630, 636 (1993) (recognizing that there are limited circumstances in which an appellate court may consider arguments not raised in the court below). Appellate review under these exceptional circumstances is discretionary, not mandatory. *See Bell*, 334 Md. at 188, 638 A.2d at 113. *See also, e.g.*, Md. Rule 4-325(e) (conferring discretion on an appellate court acting "on its own initiative or on the suggestion of a party . . . [to] take cognizance of any plain error in the [jury] instructions, material to the rights of the defendant, despite a failure to object"); *Rubin v. State*, 325 Md. 552, 587, 602 A.2d 677, 694 (1992) (noting that "as the cases hold with respect to errors of law generally, an appellate court may in its discretion in an exceptional case take cognizance of plain error even though the matter was not raised in the trial court") (citation omitted); *Robeson v. State*, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979) (discussing exceptions

to the general principle that an appellate court will not ordinarily consider an issue not previously raised).

We often have stated that the primary purpose of Rule 8-131(a) is "'to ensure fairness for all parties in a case and to promote the orderly administration of law.'" *Bell*, 334 Md. at 189, 638 A.2d at 113 (quoting *Brice v. State*, 254 Md. 655, 661, 255 A.2d 28, 31 (1969) (alteration in original) (citation omitted)). The State had an opportunity to raise its waiver claim during the post conviction proceedings, but instead chose to argue Petitioner's *Brady* claims on the merits. As a result, the post conviction court did not address waiver in connection with these arguments. While this Court may decide, in its discretion and under exceptional circumstances, matters not raised in the proceedings below, the State's contention does not merit exceptional treatment here. Nor has the State referred us to any legal authority that would support exempting the State from any of the general waiver rules in the present case.

Moreover, the State's assertion that Petitioner's *Brady* claims were waived pursuant to Art. 27, § 645A(c)(2), is misguided. In pertinent part, § 645A(c)(2), states:

> When an allegation of error *could* have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), . . . in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation. (Emphasis added).

The fundamental question the State advances here is whether Petitioner's allegations of prosecutorial

misconduct relating to the testimony of Charles Johnson have been waived by his failure to challenge the violations at trial or in the direct appeals. Petitioner argues that it is axiomatic that you "cannot waive what [you] could not reasonably know." We agree with Petitioner.

Inherent in the language of § 645A(c)(2) is the presupposition that an opportunity to raise the challenge existed at the time of the lower court proceeding. *See, e.g., Hunt v. State*, 345 Md. 122, 142, 691 A.2d 1255, 1265 (1997) (noting that "defense counsel's acceptance of the jury panel was sufficient to bar any subsequent objection thereto"); *Oken v. State*, 343 Md. 256, 271, 681 A.2d 30, 37 (1996) (recognizing that Oken's counsel's decision not to raise the adequacy of the voir dire on appeal was a deliberate one); *Walker v. State*, 343 Md. 629, 647, 684 A.2d 429, 437-38 (1996) (noting that petitioner's post conviction challenge to a jury instruction was waived by his failure to raise it when it was given). *See also, e.g., Wyche v. State*, 53 Md. App. 403, 407, 454 A.2d 378, 380 (1983) (noting that if a right alleged to have been violated is a non-fundamental right, "waiver will be found if it is determined that the *possibility* existed for the petitioner to have raised the allegation in a prior proceeding, but he did not do so"). (Emphasis added). In each of these instances the factual basis for the defendant's claim was available to the defendant, but was not properly preserved. That is not the circumstance in the case *sub judice*.

Petitioner's trial and sentencing counsels, surmising from the known fact of the plea bargain, argued inferentially that Johnson's testimonial motivation, rather than the truth for its own sake, was entirely self-interest. The discrepancies between Johnson's testimony denying

he requested a favor (when he did) and Detective Marll's corroborating testimony, however, were not revealed until Detective Marll's post conviction testimony. Similarly, there was no apparent discrepancy concerning police verification, *vel non*, of Johnson's 1994 statements regarding non-public information regarding the crimes until Detective Marll's post conviction testimony revealed otherwise.

The State cannot frustrate trial counsel's access to the factual basis for making a *Brady* claim, then cry foul when Petitioner does not raise such a challenge on direct appeal. This Court is satisfied from review of the relevant portions of the record that the factual predicate underlying Petitioner's *Brady* claims relating to the testimony and examination of Charles Johnson did not arise until the post conviction evidentiary hearing, at which point Petitioner properly raised these issues. Indeed, the State provides no evidentiary support for its bald allegation that Petitioner waived his claim under the waiver provision of § 645A(c)(2). Accordingly, we shall review Petitioner's *Brady* claims on the merits.

The *Brady* Issues (I and VIII)

A. *Brady* Requirements

As indicated above, Petitioner's flagship contentions are that he was prejudiced by the State's violations of its constitutional obligations to Petitioner under *Brady*. We begin our analysis by identifying the essential elements Petitioner must establish to succeed on a *Brady* challenge. As we recently explained in *Wilson v. State*, 363 Md. 333, 345-47, 768 A.2d 675, 681-83 (2001):

The Supreme Court made clear in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [*Brady*, 373 U.S.] at 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215. In order to establish a *Brady* violation, Petitioner must establish "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense – either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness – and (3) that the suppressed evidence is material." Evidence that is obviously favorable must be disclosed even absent a specific request by the defendant.

Impeachment evidence, as well as exculpatory evidence, is "evidence favorable to an accused." [*C*]*f. Napue v. United States*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959) (holding that the prohibition against the use of false testimony applies even when the evidence goes only to the credibility of the witness because the jury's assessment of credibility can be determinative of guilt or innocence).

The failure to disclose evidence relating to any understanding or agreement with a key witness as to a future prosecution, in particular, violates due process, because such evidence is relevant to witness's credibility. The Supreme Court

explained in *Giglio* [*v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972)] that, when the government depends almost entirely on the testimony of a key witness to establish its prima facie case and the witness's credibility, therefore, is an important issue, "evidence of *any* understanding or agreement as to a future prosecution would be relevant to his credibility . . . ." *See id.* (emphasis added). This Court underscored the same point in *Ware* [*v. State*, 348 Md. 19, 702 A.2d 699 (1997)] when we concluded that "the prosecutor's duty to disclose applies to *any* understanding or agreement between the witness and the State." *Ware*, 348 Md. at 41, 702 A.2d at 710. (emphasis in original).

The standard for measuring the materiality of the undisclosed evidence is strictest if it "demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." In [*United States v.*] *Agurs*, [427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976)] the Supreme Court explained that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." In cases where there is no false testimony but the prosecution nonetheless fails to disclose favorable evidence, the standard for materiality, in the language of the Supreme Court, is whether "there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [*S*]*ee* . . . *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).[3] Materiality is assessed by considering all of the suppressed evidence collectively. The question, therefore, "is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same," which is determined in reference to the sum of the evidence and its significance for the prosecution.

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[3] This Court has interpreted the reasonable probability standard from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to mean a "substantial possibility that . . . the result of [the] trial would have been any different." *State v. Thomas*, 325 Md. 160, 190, 599 A.2d 1171, 1185 (1992). *See* [*Thomas*, 325 Md.] at 190 n.8, 599 A.2d at 1185 n.8; *Bowers v. State*, 320 Md. 416, 426-27, 578 A.2d 734, 739 (1990).

(Some citations omitted).

Applying the above analysis in Conyers's case, we must determine whether (1) the State suppressed or withheld evidence that was (2) favorable to the Petitioner and (3) whether the suppressed evidence was material.

B. Charles Johnson's Request for a Benefit

1. State Suppression

The State argues that the post conviction hearing judge correctly found that Charles Johnson did not seek a benefit in exchange for the *information* he provided the police on 23 November 1994; accordingly, so the argument goes, the State could not have suppressed evidence of such a request. For that same reason, the State contends the hearing judge correctly concluded that Johnson and Detective Marll testified accurately and truthfully in the lower court proceedings when they denied that Johnson requested a benefit in exchange for the incriminating information against Petitioner.

Moreover, the State asserts Johnson's receipt of a benefit, i.e., the plea agreement relative to the robbery charges, in exchange for his later *testimony*, was known by Petitioner.[30] The State invites this Court to accept the post conviction judge's rationale that reconciled Detective Marll's post conviction testimony with his prior testimony by drawing a meaningful distinction between Johnson's willingness to provide the police with the incriminating information in 1994, *gratis*, and his subsequent successful negotiation with the State for a benefit in exchange for his 1996 and 1998 testimony against Petitioner. We decline the invitation.

It is well settled that this Court will not disturb the factual findings of the post conviction court unless they

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[30] Johnson's plea agreement with the State was in place less than two months following his meeting with police.

are clearly erroneous. *See Wilson*, 363 Md. at 348, 768 A.2d at 683; *Oken,* 343 Md. at 299, 681 A.2d at 51; *Gilliam v. State*, 331 Md. 651, 672, 629 A.2d 685, 696 (1993). Finding that Charles Johnson did not seek a benefit in the course of his 1994 meeting with police, the post conviction hearing judge stated:

> Charles Johnson willingly provided information to the police with no prearranged agreement or deal. He apparently elected not to sign the written statement he willingly provided in the hope that he could arrange an agreement with the State's Attorney's Office in exchange for his testimony at trial. Charles Johnson was telling the truth when he said that "he didn't right out ask for a deal [of the police]." He correctly didn't feel the police could offer a deal. Detective Marll was telling the truth that Charles Johnson didn't ask "for any promises or favors in return for the information" he gave to the police. This is verified by the fact that he did give the information to the police with no agreement or deal.
>
> Charles Johnson did want an agreement in exchange for his "testimony." He knew and/or was told that the police could not accomplish that.
>
> The only evidence which could refute the initial motivation is his subsequent act of securing an agreement to testify for the State in exchange for a benefit for him. This information was provided by the State to all counsel for the Petitioner and was the primary subject of cross-examination.

Having reviewed the entire record regarding the alleged *Brady* suppression of Johnson's full negotiations for a benefit, we find the post conviction court's factual findings are not supported by the record, and we disagree with its conclusions of law.

The State's duty to disclose exculpatory evidence as enunciated in *Brady* is to ensure that a defendant receives a fair trial. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1197, 10 L. Ed. 2d 215 (noting that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."). *See also United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 3880, 87 L. Ed. 2d 481 (1985) (stating that "[t]he *Brady* rule is based on the requirement of due process. . . . [T]he prosecutor is . . . to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . ."). Evidence will be deemed to be suppressed within the meaning of *Brady* if it is "'information which had been known to the prosecution but unknown to the defense.'" *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 557 (4th Cir. 1999) (noting the prosecutor acknowledged withholding evidence pertaining to inconsistent statements of its key identification witness to defendant's counsel) (quoting *Agurs*, 427 U.S. at 103, 96 S. Ct. at 2397, 49 L. Ed. 2d 342); *Ware*, 348 Md. at 39, 702 A.2d at 709 (stating that the necessary inquiry is "whether the defendant knew or should have known facts that would have allowed him to access the undisclosed evidence").

There is no question that the State knew that Johnson was seeking a benefit when he met with police in 1994. Detective Marll's post conviction testimony revealed that Johnson asked what could be done for him, albeit *subsequent* to his providing the police with a written, but

unsigned, statement of Petitioner's alleged confession to him. The following exchange took place between Petitioner's counsel and Detective Marll at the post conviction hearing:

> [Counsel:] Did Mr. Johnson ask you or mention anything in any way in the first hour and a half of his interrogation about his pending charges?
> [Detective Marll:] I don't recall. . . . It seems to me that once the written statement was done, obviously, because there was a question about Mr. Johnson not signing the bottom of the form that he brought up that basically he wanted something done in his behalf by the State's Attorney's Office, and that's why he initialed the form in our presence.

We have no doubt that Detective Marll understood the implications of Johnson's request, as Johnson refused to sign his statement without a commitment for a benefit, choosing instead only to initial the pages. In that regard, Detective Marll testified:

> At that time, I asked if he would sign the bottom of the statement form, and he said he didn't want to, he didn't feel comfortable signing it, but he said he would put his initials there, and he did, he wrote them on each page in front of us and placed his initials on each line next to the signature block area, and at that time, we were done.

It is equally clear that Detective Marll ostensibly offered to act as an intermediary between Johnson and the State's Attorney's office. Detective Marll testified:

> After these seven pages were done, what I asked Mr. Johnson to do was to review and sign

> each one of them, and that's when the question came up about his - - he would have had - - whatever charge it was that he had that he wanted to know what can be done for him.
>
> And at the time, we said we don't make any deals, we can't make any promises. The only thing we can do is take the statement to the State's Attorney Office, and they can get in touch with your attorney and anything along that line can be done by them. We stay entirely out of it.

Facts known to the police will be imputed to the State for *Brady* purposes. *See Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999) (noting the *Brady* rule "encompasses evidence 'known only to police investigators and not to the prosecutor'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568, 131 L. Ed. 2d 490 (1995)); *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (attributing the knowledge of the police to the Government, the Court noted, "'[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.'") (quoting *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964)).

It is undisputed that the substance of Detective Marll's testimony concerning the commencement and course of Johnson's negotiations for a benefit was withheld from Petitioner until the post conviction hearing. Petitioner's pretrial requests for disclosure of *Brady* material, discussed *supra*, failed to elicit any documentation concerning Johnson's negotiations for a deal. Petitioner reasonably relied upon the State's open file policy as fulfilling the prosecution's duty to disclose the evidence he

requested. *See Strickler*, 527 U.S. at 283 n.23, 119 S. Ct. at 1949 n.23., 144 L. Ed. 2d 286 (stating that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."). The reasonableness of Petitioner's reliance was confirmed by the State's statement that it had "well" exceeded the requirements of *Brady* by providing Petitioner with all pertinent portions of its files.

We shall not entertain the State's hair-splitting in honoring form over substance. The record demonstrates that Petitioner's counsel attempted, based on the plea bargain alone, to persuade the jury that Johnson sought a favor for his allegedly fabricated testimony regarding Petitioner's alleged confession.[31] Petitioner's various

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[31] The Dissent, at 2, suggests that it is "universally understood that plea bargaining constitutes favors," and therefore, when the jury was "informed of the plea agreement, it, impliedly, was informed that a give and take process [an exchange of favors] for Johnson's testimony had been undertaken and been consummated." Assuming that to be an accurate abstract generalization, the State, in this case, attempted to counter such a notion by implying, at both trial and sentencing, that Johnson received nothing more nor less in terms of a bargain on his pending charges than what was commensurate with his participation as the getaway driver in the Wendy's Restaurant robbery. In its closing at trial, the State claimed:

> We have this incredible exaggeration

(continued...)

counsel were understandably unsuccessful in uncovering

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[31](...continued)

> of what [Johnson's] participation was in [the Wendy's robbery], and the basis for this plea agreement. . . . We know that he was a getaway driver in a robbery, that's why he didn't know how many victims there were, he wasn't inside the place. . . .
>
> We know that the sentencing guidelines for the crime that he plead guilty to are between one and six years incarceration. And what's the State asking for? The sentencing guidelines of one to six years incarceration. He plead guilty to conspiracy to commit the crime of robbery, and that is supposed to be the motivation for him to walk in here and lie . . . .

In its sentencing closing argument, the State said:

> And this great deal that the defense tells you he got, he stated all these hundreds of years. Well in fact, Mr. Charles Johnson had to plead guilty, did plead guilty to conspiracy to commit robbery, and the State recommended a sentence of one to six years, which is what the guidelines were, the regular guidelines for a person that committed that offense. For all of that, that man is going to come in and lie about a first degree murder in a death penalty case? So much for that great deal.

on their own the full circumstances precipitating the ultimate plea bargain. The sole basis offered by the State, and accepted by the post conviction judge, for resisting disclosure of the full extent of the negotiations was the State's arbitrary and circumscribed interpretation of Petitioner's cross-examinations of Johnson and Detective Marll concerning the matter. Indeed, Johnson and Detective Marll nimbly sidestepped complete and accurate responses by interpreting the questions posed to them in terms of "promises or favors" in exchange for Johnson's 1994 "information," rather than for his later testimony. In effect, these witnesses intellectually bifurcated the pertinent course of events in order to make the nice distinctions offered at the post conviction hearing as explanations for why their earlier testimony was not incomplete or perhaps simply false.[32] The State's lack of

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[32] In describing the offense of perjury in *Brown v. State*, 225 Md. 610, 616, 171 A.2d 456, 458 (1961) (citations omitted), this Court said:

> The offense consists in swearing falsely and corruptly, without probable cause of belief; not in swearing rashly or inconsiderately, according to belief. The false oath, if taken from inadvertence or mistake, cannot amount to voluntary or corrupt perjury. . . . That the oath is wilful and corrupt must not only be charged in the indictment, but must be supported on trial. An oath is wilful when taken with deliberation, and not through surprise or confusion, or a bona fide

(continued...)

candor was never more apparent as when, at sentencing, the State pointedly asked Detective Marll if Johnson had "at any time" during the course of their conversations ever asked him for "any promises in return for the *information*" that he provided, eliciting Detective Marll's categorical response, "No sir, he did not." (Emphasis added).

It is clear to us that the State's and the witnesses' deceptive approach was intended to evade the thrust of Petitioner's questioning. We find the commencement of Johnson's negotiations leading up to the plea agreement for his testimony against Petitioner, and the fact that he declined to sign the written statement because no immediate commitment for a benefit was forthcoming, to be inseparable conceptually from his initially apprising the police of the incriminating information. After all, Johnson's unsigned, written statement would be of limited or no value to the State without his consistent in-court testimony.[33] We find that the evidence concerning

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[32](...continued)
mistake as to the facts, in which latter cases perjury does not lie.

See also Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 435 (defining, in pertinent part, the crime of perjury as "[a]n oath or affirmation, if made willfully and falsely in any of the following cases . . . all cases where false swearing would be perjury at common law . . . ."). While we shall not find that the State offered perjured testimony, we cannot condone the *Brady* violations apparently employed to enhance the credibility of Johnson.

[33] Absent Johnson's testimony at trial, the State
(continued...)

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[33](...continued)
would have been unable to offer his unsigned, written statement of 23 November 1994 as substantive evidence of Petitioner's guilt, as it does not fall within any exception to the Maryland Rules on hearsay, Rules 5-801-5-806.

On the other hand, in accordance with Md. Rule 5-802.1(a)(3), the initial portion of Johnson's handwritten statement recounting the facts surrounding Petitioner's alleged confession might be successfully admitted as substantive evidence of Petitioner's guilt if Johnson, called by the State as a witness and subject to cross-examination, testified inconsistently with this prior statement. Md. Rule 5-802.1 provides in pertinent part:

> **Hearsay exceptions – Prior statements by witnesses.**
> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement. . . .

(continued...)

Johnson's initial request for a benefit and his refusal to sign the written statement when such a benefit was not immediately forthcoming was within the exclusive control of the State, and the State's failure to disclose this evidence upon request consequently constituted a "suppression" within the meaning of *Brady*.

2. Evidence Favorable to the Petitioner

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[33](...continued)

In *Stewart v. State*, 342 Md. 230, 674 A.2d 944 (1996), this Court observed in dicta that prior inconsistent, unsigned written statements are not admissible under Md. Rule 5-802.1(a)(3) as substantive evidence "unless they are recorded substantially verbatim by a reliable stenographer or electronic means contemporaneously with the making of the statement," further noting that "an unsigned statement taken down in a police officer's 'shorthand' is not substantive evidence" under Md. Rule 5-802.1(a)(3). *Stewart,* 342 Md. at 238, 674 A.2d at 948. As the portion of Johnson's statement concerning Petitioner's alleged confession was transcribed in his own handwriting, this portion of the statement might have satisfied the reliability requirements of Md. Rule 5-802.1(a)(3), allowing its possible admission as substantive evidence. If Johnson took the stand and refused to testify, however, the State would be unable to introduce the statement as a prior inconsistent statement, as refusal to testify is not deemed "inconsistent" with prior testimony. *See Tyler v. State*, 342 Md. 766, 777, 679 A.2d 1127, 1133 (1996).

To succeed on a *Brady* claim, Petitioner also must establish that the suppressed evidence was favorable to his defense. As indicated above, favorable evidence encompasses not only exculpatory evidence, but also evidence that may be used to impeach the credibility of a witness. *See Wilson*, 363 Md. at 345-46, 768 A.2d at 681-82. The Court has recognized the importance of impeachment evidence, noting that "'if disclosed and used effectively, [impeachment evidence] may make the difference between conviction and acquittal.'" *Spicer*, 194 F.3d at 556 (quoting *Bagley*, 473 U.S. at 676, 105 S. Ct. at 3380, 87 L. Ed. 2d 481). *See also Strickler*, 527 U.S. at 282 n.21, 119 S. Ct. at 1949 n.21, 144 L. Ed. 2d 28 (recognizing that *Brady's* disclosure requirements "extend to materials that, whatever their other characteristics, may be used to impeach a witness"). *Cf. Napue*, 360 U.S. at 269, 79 S. Ct. at 1177, 3 L. Ed. 2d 1217 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

It is well established that the State's failure to disclose the existence of a plea agreement with a key witness violates *Brady* standards, because the terms of the agreement might provide evidence regarding the witness's motivation to testify. *See Giglio*, 405 U.S. at 154-55, 92 S. Ct. at 766, 31 L. Ed. 2d 104; *Wilson,* 363 Md. at 348, 768 A.2d at 683; *Ware*, 348 Md. at 50, 702 A.2d at 714 (recognizing that evidence of a plea agreement between the State and a witness is "powerful impeachment evidence" that "enables a defendant to attack the motive or bias of a witness . . . ." and must be disclosed to the

accused); *Marshall v. State,* 346 Md. 186, 198, 695 A.2d 184, 190 (1997) (recognizing that a jury is entitled to know the terms of a plea agreement between a State and its witness so that it may assess whether the witness's testimony "has been influenced by bias or motive to testify falsely"); *cf. Napue*, 360 U.S. at 270; 79 S. Ct. at 1177, 3 L. Ed. 2d 1217 (holding that the failure of the prosecutor to correct the false testimony of a witness relating to the absence of an inducement by the State for his testimony was prejudicial for impeachment purposes).

Recently, under the dictates of *Brady*, this Court, in *Wilson v. State*, 363 Md. 333, 768 A.2d 675 (2001), reversed a petitioner's conviction where the State failed to disclose the specific terms of its written plea agreements with two key codefendant witnesses, even where the jury had been apprised of the existence of the agreements through the testimony of the State's witnesses. *Wilson*, 363 Md. at 356, 768 A.2d at 687. We rejected the State's argument that its disclosure was sufficient, determining that the specific terms of the written plea agreements were favorable to Wilson's impeachment strategy and should have been disclosed. *Wilson*, 363 Md. at 349, 768 A.2d at 683-84. This was particularly true, the Court noted, where the witnesses' testimony concerning the terms of the agreements were inaccurate, and were then further mischaracterized by the State in closing arguments. *Wilson*, 363 Md. at 356, 768 A.2d at 687. *Wilson* is instructive in the present case.

Here, while Petitioner and the jury were aware of the existence of Johnson's plea agreement in return for his testimony, the State withheld arguably related circumstances leading up to its consummation, namely, that Johnson, indeed, requested a favor, and that he refused

to sign his written statement absent such a commitment. This was evidence that disputed Johnson's later testimony (and the State's trial arguments), which information would have strengthened Petitioner's assertion that Johnson had fabricated Petitioner's alleged confession in an effort to garner a benefit on outstanding charges.

The State argues that Johnson's self-interest was "more than adequately" presented to the jurors, and that they were presented with a "full picture" of Johnson through his testimony. We disagree. Defense counsel was entitled to explore and argue from all of the pertinent evidence as to Johnson's bias and credibility. Suppression of this evidence deprived the jurors of a full opportunity to evaluate the credibility of Johnson's testimony, and Detective Marll's corroborating testimony, and deprived Petitioner of potentially valuable impeachment evidence. The difference in potential impeachment value of this information increased during the sentencing phase, as we discuss further *infra,* because of Johnson's position as the key witness to Petitioner's principalship in the murder of Wanda Johnson.

Similar to *Wilson*, the value of the suppressed information as impeachment evidence was confirmed by the State's efforts to conceal it from Petitioner. The State offered, without correction, Johnson's testimony asserting his altruistic motives in contacting the police and repeated denials of his solicitation of a *quid pro quo* for the information. The State persisted in this tact by placing a police detective on the witness stand to bolster indirectly Johnson's testimony, both as to motive in giving it and in substance. The State's conduct continued in its closing arguments, at trial and sentencing, in which it extolled

Johnson's credibility as a witness, knowing its own sins of omission.

While it is true that Petitioner vigorously cross-examined Johnson in an attempt to discredit his testimony, and argued by inference a link between Johnson's motive in coming forward and the plea agreement, that does not necessarily vitiate any error caused by the State's failure to disclose this impeachment evidence. *See Wilson*, 363 Md. at 351, 768 A.2d at 684 (stating that cross-examination of a witness regarding inducement "to testify does not substitute for adequate disclosure"); *Boone,* 541 F.2d at 451 (noting that "[n]o matter how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture – a conjecture which the prosecutor disputed."). *See also Martin v. State*, ___ So.2d___, 2001 Ala. Crim. App. Lexis 298, 21 (Ala. Crim. App. 2001) (likening defendant to a "fighter with one hand tied behind his back -- the fact that he was able to land a few punches in cross-examination with one fist did not make the match a fair one"). Under the facts of this case, the State's failure to disclose the impeachment evidence violates *Brady* principles.

3. Material Evidence

Petitioner's final obstacle in establishing a *Brady* violation is materiality. As this Court explained in *Wilson*, discussed *supra*, there are two different materiality standards[34] that may be applied to the analysis of

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[34] In his dissent in *Strickler v. Greene*, 527 U.S. 263, 298-300, 119 S. Ct. 1936, 1956-57, 144 L. Ed. 2d 286 (1999) (Souter, J., dissenting), Justice Souter provided an

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[34](...continued)
instructive review of the evolution in the Supreme Court of the materiality standard imposed by the *Brady* rule:

> *Brady* itself did not explain what it meant by "material" (perhaps assuming the term would be given its usual meaning in the law of evidence, *see United States v Bagley*, 473 U.S. 667, 703, n.5, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in *United States v. Agurs*, [427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)], where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testimony, reversal was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. *Agurs,* [427 U.S.] at 103 (citing *Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), in turn quoting *Napue v. Illinois*, 360 U.S. 264, 271, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)). We have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. *Bagley,* [473 U.S.] at 678-680, and n.9

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[34](...continued)
(opinion of Blackmun, J.). *See also Brecht v. Abrahamson*, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no "'reasonable possibility' that trial error contributed to the verdict"); *Chapman v. California,* 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (same). In *Agurs*, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's "'conviction [was] sure that the error did not influence the jury, or had but very slight effect.'" [*Agurs,*] 427 U.S. at 112 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)). Finally, in *United States v. Bagley,* [473 U.S. at 682], we embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed.

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suppressed exculpatory evidence. The strictest, and more defendant-friendly, *Napue/Agurs* standard applies in those cases where "'the prosecution's case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury.'" *Wilson*, 363 Md. at 346-47, 768 A.2d at 682 (quoting *Agurs*, 427 U.S. at 103, 96 S. Ct. at 2397, 49 L. Ed. 2d 342). The Supreme Court explained in *Agurs* that "'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair,'" accordingly, it "'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* (quoting *Agurs*, 427 U.S. at 103, 96 S. Ct. at 2397, 49 L. Ed. 2d 342). *See Napue*, 360 U.S. at 272, 79 S. Ct. at 1179, 3 L. Ed. 2d 1217.

A different standard of materiality applies in those cases where there is no perjured testimony, but there is prosecutorial failure to disclose exculpatory evidence. Under the *Brady/Bagley* materiality standard, evidence will be deemed material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome'" of the case. *Wilson*, 363 Md. at 347, 768 A.2d at 682 (quoting *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d 481 (opinion of Blackmun, J.)). *See also Kyles*, 514 U.S.

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[34](...continued)
2d 674, 104 S. Ct. 2052 (1984), where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. . . .

at 433-34, 115 S. Ct. at 1565, 131 L. Ed. 2d 490. This Court has interpreted the *Strickland* "reasonable probability" standard to mean a "'substantial possibility that . . . the result of [the] trial would have been any different.'" *Wilson*, 363 Md. at 347 n.3, 768 A.2d at 683 n.3 (quoting *State v. Thomas*, 325 Md. 160, 190, 599 A.2d 1171, 1185 (1992)). *See also Thomas*, 325 Md. at 190 n.8, 599 A.2d at 1185 n.8; *Bowers v. State*, 320 Md. 416, 426-27, 578 A.2d 734, 739 (1990). This standard applies to "the 'no request,' 'general request,'and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d 481 (opinion of Blackmun, J.).[35] *See Ware*, 348 Md. at 48, 702 A.2d at 713 (noting that under *Bagley*, the Court "no longer distinguish[es] for purposes of determining the standard of materiality among cases in which the defense made a specific request as opposed to a general request or no request at all").

Petitioner asserts that the stricter standard of materiality enunciated in *Napue* applies under the facts of

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[35] In *Bagley*, Justice Blackmun found the "*Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused . . . ." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d 481 (opinion of Blackmun, J.). *See also supra* note 34, discussing Justice Souter's dissent in *Strickler*, 527 U.S. at 298-300, 119 S. Ct. at 1956-58, 144 L. Ed. 2d 286 (Souter, J., dissenting) (reviewing the evolution of the *Brady* rule).

this case, arguing that the State affirmatively presented perjured testimony. Accordingly, Petitioner contends, a new trial, or at least a new sentencing, is required because there was a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Wilson*, 363 Md. at 347, 768 A.2d at 682 (citation omitted). Petitioner alternatively argues that he is entitled to a new trial or sentencing because he meets the *Brady/Bagley* standard of materiality, as there was a "substantial possibility" that the outcome of the trial or sentencing would have been different had the withheld information been disclosed. *See Wilson*, 363 Md. at 347 n.3, 768 A.2d at 683 n.3. (citations omitted). While the *Napue* standard of materiality is not indicated in the present case, *supra* note 32, we are satisfied that Petitioner has met the stricter standard of showing materiality under *Brady/Bagley*. The record supports our conclusion that, had the evidence relating to Johnson's complete negotiations for a benefit been disclosed, there was a substantial possibility that the outcome would have been different.

We base our conclusion on several factors this Court has used to assess materiality for purposes of suppressed impeachment evidence. *See Wilson,* 363 Md. at 352-55, 768 A.2d at 685-87.[36] First, Johnson was a key State's

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[36] The Court in *Wilson* recognized several factors to which courts have looked to assess materiality for the purposes of suppressed impeachment evidence, which we apply in the instant case:

> [T]he closeness of the case against the defendant and the cumulative weight of the

(continued...)

witness as to Petitioner's principalship in Wanda Johnson's murder. Principalship directly governs Petitioner's eligibility for the death penalty. *See* Md. Code (1957, 1996 Repl. Vol., 1998 Supp.), Art. 27, § 413(e)(1) (restricting the death penalty only to persons convicted of first degree murder as a principal in the first degree). A principal in the first degree is "'one who actually commits a crime, either by his own hand, or by [an] inanimate agency, or by an innocent human agent.'" *Gary v. State*, 341 Md. 513, 520, 671 A.2d 495, 498 (1996) (quoting *Johnson v. State*, 303 Md. 487, 510, 495 A.2d 1, 12 (1985) (alteration in original) (citation omitted)). Johnson's testimony concerning Petitioner's alleged confession affirmatively and directly cast Petitioner, rather than his alleged accomplice (Bradshaw), as the actual perpetrator of her murder.[37]

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[36](...continued)

> other independent evidence of guilt, the centrality of the particular witness to the State's case, . . . whether and to what extent the witness's credibility is already in question, and the prosecutorial emphasis on the witness's credibility in closing arguments.

363 Md. at 352, 768 A.2d at 685 (citations omitted).

[37] Judge Raker, in her dissent in *Conyers II*, recognized Charles Johnson as the State's primary witness on principalship, noting that "his credibility was central to the question of whether [Petitioner] was eligible for the

(continued...)

Second, a determination of the relative significance of the suppressed evidence requires an understanding of the evidence that was presented at trial and sentencing. *See Wilson*, 363 Md. at 353, 768 A.2d at 685 (noting that the testimony of a codefendant witness provided the "only direct link between Petitioner and the crime"). The State disputes that Johnson's testimony at trial and sentencing was the only evidence of Petitioner's involvement or, as to Ms. Johnson's death, his principalship, respectively, in the murders. While that may be so, the other evidence to which the State refers is circumstantial. As indicated *supra*, the sentencing testimony, other than Johnson's, placed only Lawrence Bradshaw in the victim's home at the time of her murder. While there was circumstantial evidence adduced during the guilt/innocence portion of the trial that would permit a reasonable jury to conclude that Petitioner was a participant in her murder, it is less apparent that, absent belief of Johnson's testimony, the evidence would have been sufficient to find, beyond a reasonable doubt, Petitioner was the principal. If Johnson's testimony is to be believed, there are no inferences that need be drawn from the circumstantial evidence, either at trial or sentencing, in order to conclude that Petitioner was involved, or the shooter, in both murders. We should not be understood to hold, however, that the circumstantial evidence at trial and sentencing, exclusive of Johnson's testimony, necessarily was constitutionally insufficient for a reasonable jury to

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[37](...continued)
death sentence." *Conyers II*, 354 Md. at 204, 729 A.2d at 948 (Raker, J., dissenting).

convict or render a sentence of death. We hold only that the taint of the *Brady* suppression matters on this record so undermines our confidence in the murder convictions and death sentence that a new trial is in order.

We reject the State's argument that the jury was provided with a "full picture" of Johnson through the testimony at both trial and the sentencings, referring to vigorous efforts by Petitioner's lawyers to portray Johnson as a jailhouse snitch out to get a deal. For the reasons discussed *supra*, we cannot say that if the jury was informed of the totality of the circumstances leading up to Johnson's ultimate plea agreement, there would not be a substantial possibility that the outcome would have been different had the withheld information been disclosed. *See Wilson*, 363 Md. at 353, 768 A.2d at 686 (noting that Wilson's trial counsel's attempt to cross-examine the State's key witnesses "was far less effective than it would have been" had he possessed the written agreements that specified the terms).

Finally, the State was an active participant in the 'smoke and mirrors' effort to mislead the Petitioner and jury as to the full circumstances preceding and precipitating Johnson's plea agreement. As previously noted *supra*, the prosecutor at sentencing expressly asked Detective Marll if Johnson had "at any time ever ask[ed] [him] for any promises or favors in return for the information he was giving [him]," deliberately eliciting Detective Marll's denial. In closing argument at trial, the prosecutor trumpeted Johnson's version of why he contacted police by claiming Johnson told the truth "because it was the right thing to do." In both proceedings, the State emphasized Johnson's credibility as a witness. The importance of Johnson's credibility was

evidenced by the State's efforts to argue his credibility in its last words to the jury. *See Wilson*, 363 Md. at 355, 768 A.2d at 687 (recognizing that "the 'likely damage' of the State's suppression of evidence in this case 'is best understood by taking the word of the prosecutor . . . during closing argument.'") (quoting *Ware*, 348 Md. at 53, 702 A.2d at 715 (citations omitted)).

Applying the final test of materiality pertinent to these facts, we conclude that the State suppressed material impeachment evidence of Johnson's negotiations for a benefit. Accordingly, we reverse, based on the *Brady* claims, the lower court's judgment denying Petitioner post conviction relief. We remand this case to the Circuit Court for Wicomico County for a new trial. We shall not reach Petitioner's remaining issues.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR A NEW TRIAL; COSTS TO BE PAID BY WICOMICO COUNTY.

IN THE COURT OF APPEALS OF MARYLAND

No. 26

September Term, 2001

CLARENCE CONYERS, JR.

v.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Raker
Wilner
Cathell
Harrell
Battaglia
JJ.

Dissenting opinion by Cathell, J.
in which Wilner, J., joins

Filed February 5, 2002

I respectfully dissent. The majority's opinion in this third examination of Conyer's conviction (*Conyers III*, I suppose) is a result looking for justification that, in actuality, does not exist.

The majority's reversal is based solely on the *Brady*[38] issue. It does not address the remaining issues (other than those relating to waiver with which I do not take issue). The majority states:

> "[W]e must determine whether (1) the State suppressed or withheld evidence that was (2) favorable to the Petitioner and (3) whether the suppressed evidence was material."

I agree that if the evidence of Johnson's attempts to obtain favorable treatment in return for his testimony had been suppressed by the State, it was both favorable to the petitioner and material. The problem is, regardless of the majority's massive dumping of legal authority in its opinion and the discussion of perjury by the majority in a footnote, that the evidence was not suppressed or withheld in the first instance.

I have no dispute about the application of *Brady*. The extensive discussion of that case and its progeny in the majority's opinion serves primarily to obfuscate the weakness of its factual determination in the case. The majority's reversal is based not upon the law but upon its interpretation of the facts.

What is clear is that the purpose of the whole line of *Brady* cases is to insure that the trier of fact has before it any material impeachment (in this case) evidence. The

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[38] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

impeachment evidence in this case was that Johnson, the witness at issue, received benefits for his testimony by way of a favorable plea bargain in respect to unrelated charges he was facing.

The majority states:

> "Here, while Petitioner and the jury were aware of the existence of Johnson's plea agreement in return for his testimony, the State withheld arguably related circumstances leading up to its consummation, namely, that Johnson, indeed, requested a favor, and that he refused to sign his written statement absent such a commitment."

The favor Johnson requested was the plea agreement he received from the State and that plea agreement was made known to the jury. It is almost, I would suggest, universally understood that plea bargaining constitutes favors. Additionally, the very use of the general term "bargain" implies a give and take procedure where things are withheld and other things offered; some are accepted, some are rejected. When the jury was informed of the plea agreement, it, impliedly, was informed that a give and take process for Johnson's testimony had been undertaken and been consummated.

Additionally, the majority's reasoning is, in my view, sophistic in nature. Parsed of extraneous material, the majority is holding that because the detective's and Johnson's testimony about their prior communications was the *type* of testimony that could tend to obscure the existence of a beneficial plea bargain for Johnson on his unrelated charges, the case must be reversed under *Brady*, even though the beneficial plea bargain was, in fact, fully

disclosed to the jury. The jury was fully apprised of the possible motive of Johnson to fabricate his testimony.

The purpose of the *Brady* holding (as applied in the impeachment context) is to insure that the jury is made aware of the motive for fabrication on the part of the witness, not to mandate that every nuance of the process from which the motive to fabricate originates be remembered and/or disclosed.

Had Johnson's plea bargain not been disclosed to the jury, the dictates of the *Brady* line of cases would not have been met and I would join the majority. In my view, however, the requirements of *Brady* were met.

The majority does not address the other issues. Nonetheless, were I writing for the majority of the Court, I would affirm on all issues presented.

Judge Wilner has authorized me to state that he joins in this dissent.

APPENDIX B

IN RE:	* IN THE
CLARENCE CONYERS, JR. #184-805	* CIRCUIT COURT
Application for Relief Under the Uniform Post Conviction Procedure Act	* FOR
	* WICOMICO COUNTY
	* CASE NO. 96CR0458, 6CR0460

* * * * * * * * *

ORDER

For reasons stated in the attached Memorandum Opinion, it is this 30th day of January, 2001, by the Circuit Court for Wicomico County,

ORDERED, that the Petition of Clarence Conyers, Jr., for relief under the Uniform Post Conviction Procedure Act, be and the same is hereby denied.

/s/
Judge Edward J. Angeletti

IN RE:	* IN THE
CLARENCE CONYERS, JR. #184-805	* CIRCUIT COURT
Application for Relief Under the Uniform Post Conviction Procedure Act	* FOR
	* WICOMICO COUNTY
	* CASE NO. 96CR0458, 6CR0460

* * * * * * * * *

MEMORANDUM OPINION

STATEMENT OF CASE

This is Petitioner's first application under the Uniform Post Conviction Procedure Act, Md. Ann. Code, Art. 27, Section 645A-J, and Maryland Rules 4-401 through 4-408. Clarence Conyers, Jr., (Petitioner) was convicted in the Circuit Court for Wicomico County of premeditated murder, felony murder, first-degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, robbery, attempted robbery, and use of a handgun in the commission of a crime of violence with respect to Wanda Johnson. In the same proceeding, Petitioner was convicted of premeditated murder and use of a handgun in the commission of a crime of violence as to Lawrence Bradshaw. Petitioner was sentenced to death for the murder of Johnson and to life without the possibility of parole for the murder of Bradshaw. On direct appeal, the Court of Appeals, in *Conyers v. State*, 345 Md. 525, 693

A.2d 781 (1997) (*"Conyers I"*) reversed the burglary conviction and set aside the death sentence, finding that the trial court committed reversible error in admitting a portion of the presentence investigation report referring to Petitioner's prior juvenile charges that had not resulted in a finding of delinquency. The Court remanded the case for a new sentencing proceeding in accordance with Maryland Code (1957, 1996 Repl.Vol., 1998 Supp.), Article 27, Section 413.

The Court of Appeals, in affirming the other judgments, also held that: (1) the trial court did not abuse its discretion in refusing to admit Petitioner's proffered exculpatory evidence under doctrine of completeness; (2) such evidence was not admissible under doctrines of opening the door or curative admissibility; (3) evidence of each murder was admissible as to the other, thus justifying joinder of two murders for jury trial; (4) evidence of breaking was insufficient to sustain conviction for burglary; (5) evidence supported Petitioner's convictions for robbery and robbery with a deadly weapon; (6) prosecution witness's testimony that Petitioner told him that Petitioner and another individual were supposed to meet up to "hustle" did not necessitate mistrial; (7) admission of witness's testimony regarding Petitioner's alleged violent tendencies or use of drugs did not amount to plain error; (8) adjudications of delinquency did not have to involve crimes of violence to be admissible; (9) descriptions of prior juvenile adjudications did not violate prohibition against admission of inflammatory detailed evidence of underlying facts and circumstances surrounding unrelated crimes; and (10) death penalty statute is constitutional.

On January 17 and January 26-28, 1998, the Circuit Court for Wicomico County, The Honorable D. William Simpson, J., presiding with a jury as requested by Petitioner, conducted the new capital sentencing proceeding. Petitioner was again sentenced to death for the Wanda Johnson murder. On direct appeal, the Court of Appeals, in *Conyers v. State*, 354 Md. 132 (1999) (*Conyers II*), affirmed the judgment of death and held that: (1) detective's rebuttal testimony regarding information that Petitioner's cellmate provided State did not invade province of jury; (2) testimony about alleged statements of cellmate was inadmissible on hearsay grounds; (3) trial court did not commit plain error with respect to instruction on non-statutory mitigating circumstance of sympathy or mercy; (4) testimony of professor as to philosophy underlying task of sentencing was inadmissible; (5) victim impact witness did not impermissibly convey to jury that Petitioner was previously sentenced to death; (6) "other crimes" evidence consisting of domestic violence testimony was admissible; (7) inclusion of name of second murder victim, who was apparent participant in break-in resulting in first murder, in presentence investigation (PSI) report was not prejudicial error; (8) photographs of victim were admissible; (9) Sixth Amendment right to counsel did not prohibit admission of Petitioner's statement to estranged girlfriend; and (10) death penalty statute was not unconstitutional as applied or facially unconstitutional.

Arguments Presented for Consideration at Post Conviction

Petitioner filed this Petition for Post Conviction Relief[1] in which he makes the following allegations:

A. Ineffective Assistance of Trial and Appellate Counsel[2] Regarding the Guilt/Innocence Phase

1. TC failed to show with "available evidence" that Mr. Conyers was intentionally placed together with Charles Johnson in an effort to gather evidence against the Petitioner.
2. TC and AC failed to argue against joinder of the two murder trials on federal constitutional grounds.
3. TC failed to develop evidence before trial that Lawrence Bradshaw possessed a firearm at the time of his death.
4. TC failed to discover evidence that Charles Johnson provided information to the State regarding a Martin Quincy Johnson and that, in September, 1995, Charles Johnson was even produced to testify in the Martin prosecution.

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[1] Counsel, appointed by the Public Defender's Office, filed supplemental amended petitions. For purposes of this Memorandum, the original and amended petitions will be considered as a whole and designated as "petition."

[2] The following abbreviations are used herein: IAOC = Ineffective Assistance of Counsel; TC = Trial Counsel; and AC = Appellate Counsel.

5. TC failed to discover that Katherine Hadel had been shown a photo spread and failed to identify the Petitioner.
6. During voir dire, TC failed to inquire of jurors whether they could conceive of a case where they would always vote for the death penalty, regardless of mitigating factors.
7. TC failed to object to the removal, upon motion by the state, of three jurors for cause who had stated they were morally opposed to the death penalty based upon their religion.
8. TC failed to object to Monica Wilson's testimony that her mother, Wanda Johnson, told her that she had Twenty Dollars on her person shortly before her death.
9. TC failed to object specifically to Monica Wilson's testimony at trial that Mr. Conyers said he had two .38 caliber handguns.
10. TC failed to object when the trial court curtailed defense questions directed to Monica Wilson regarding her drug use.
11. TC failed to cross examine Carla Clinton on her failure to identify Lawrence Bradshaw in a photo spread as the intruder she saw in Wanda Johnson's residence the night of the murder.
12. TC failed to object to testimony by Monica Wilson regarding drug use and violence between herself and the Petitioner.
13. TC and AC failed to raise a federal constitutional claim in their efforts to introduce hearsay evidence to show that the Petitioner did not possess firearms at the time of the murder.

14. TC failed to object when the trial court barred them from cross examining a State witness regarding Lawrence Bradshaw's occupation and later, when the trial court barred TC from eliciting testimony from a defense witness on the same subject.
15. TC failed to state in federal constitutional terms their voiced objection to testimony by Clarence Johnson about Petitioner's alleged statement that he and Lawrence Bradshaw intended to rob people after the murder of Wanda Johnson. Petitioner also asserts that TC erroneously failed to request a limiting instruction regarding the use to which such testimony could be put.
16. AC failed to raise a federal constitutional claim when arguing that the trial court was in error when it permitted Charles Johnson to testify to Petitioner's alleged statement that he and Lawrence Bradshaw intended to rob people after the murder of Wanda Johnson.
17. TC failed to interrogate Charles Johnson at trial regarding instances of dishonesty and false statement:
    a. Charles Johnson's lies to his employer, Murry's Steaks.
    b. Charles Johnson's lies to the police.
    c. Charles Johnson's failure to file tax returns.
    d. Charles Johnson's practice of "trolling" for information in the Detention Center in an effort to obtain a favorable sentence recommendation.
    e. Charles Johnson's history of failure to comply with lawful police instructions.

18. AC was ineffective in failing to preserve on appeal timely objections at trial and demands for a mistrial by TC arising from and responding to numerous audible comments made by Wanda Johnson's family during the trial.
19. AC failed to continue to press timely objections raised at trial regarding prejudicial photographs.
20. TC failed to object to the jury's proximity to bench conferences and their ability to overhear such conferences.
21. TC were ineffective for failing to request an instruction limiting consideration of each murder to the other based upon the relevance stated in the trial court's ruling on the Petitioner's severance motion.
22. TC failed to seek a jury instruction directing the jury to consider each charge separately and failed to object to the Court's charge which lacked such an instruction.
23. AC failed to contest as plain error the erroneous jury charge lacking the other crimes and individual consideration instructions.
24. TC failed to object to improper statements made by the State in closing argument:
    a. "[I]f this man lives by any rules at all, he lives by this one rule, don't leave any live witnesses. . . . Right now, you're about forty feet away from a cold-blooded killer."
    b. The testimony of Chrissy Harding and Christy Collison was "totally unimpeached."
    c. The facts that Charles Johnson provided to the police "were not on TV."

d. The State's repeated arguments that Charles Johnson told the truth.

e. The State's showing of a crime scene photograph to the jury and subsequent statement, "[m] ake a decision you can live with the rest of your lives. Find him guilty."

25. The cumulative effect of the errors made by TC and AC denied Petitioner effective assistance of counsel in violation of the Sixth Amendment, the Maryland Declaration of Rights, and Maryland law.

B. Ineffective Assistance of Trial and Appellate Counsel - Regarding the Sentencing Phase

1. TC and AC failed to argue at sentencing and on appeal that hearsay is admissible in a capital sentencing proceeding.
2. TC was ineffective for failing to cross examine Charles Johnson about statements made to Arthur Rogers and Ventura McLee.
3. TC failed to cross examine Charles Johnson regarding certain instances of dishonesty:
   a. Charles Johnson's personnel file at Murry's Steaks.
   b. Charles Johnson's statements to the police about the Wendy's robbery.
   c. Failure of Charles Johnson to file tax returns.
   d. Charles Johnson trolled for information in the Detention Center.
   e. Charles Johnson's prior defiance of lawful police instruction.
4. TC failed to object to improper victim impact evidence offered by Victoria Gibson.

5. TC failed to present and develop mitigation evidence adequately.
6. TC failed to object to improper argument from the State which permitted the State to avoid meeting its burden to prove principalship in the first degree.
7. TC failed to object to improper opinion evidence of Detective Philip Marll which impermissibly bolstered the testimony of the State's key witness, Charles Johnson.
8. TC failed to object to the admission of other crimes evidence during the testimony of Monica Wilson.
9. AC was ineffective for raising on direct appeal unpreserved issues for which all of the relevant facts were not contained in the record on appeal.
10. TC failed to object to evidence of Mr. Conyers' conviction of the murder of Lawrence Bradshaw.
11. TC failed to request sufficient *voir dire* to determine juror predisposition to the death penalty.
12. TC failed to request a jury instruction as to the evidence that Mr. Conyers had murdered Lawrence Bradshaw.
13. TC failed to object to the prosecutor's closing argument that Mr. Conyers was a "cold-blooded career killer."
14. TC failed to object to argument of the State regarding the weighing process at sentencing.
15. TC failed to object to expressions of personal feelings and speculation as to facts not in evidence during the State's closing argument.

16. TC failed to request that the language of the Findings and Sentence Determination Form be amended to remove the word "evidence."
17. TC failed to ask the trial judge to remove all reference to unanimity as to mitigating circumstances on the Sentencing Form.
18. TC erred in allowing the aggravators of robbery and attempted robbery to be submitted to the jury.
19. TC and AC erred in (a) permitting the jury to overhear bench conferences; (b) failing to object to prejudicial photographs; and (c) failing to object to audible comments by the audience.
20. TC was ineffective for failing to object to the absence of the Petitioner from the unrecorded chambers conference where the Court heard argument from the State and from the defense as to an important evidentiary matter.
21. The cumulative effect of the errors made by TC and AC denied Petitioner effective assistance of counsel in violation of the Sixth Amendment, the Maryland Declaration of Rights, and Maryland law.

C. <u>Court Error at Trial at Guilt/Innocence</u>

1. The trial court erroneously permitted the dismissal of jurors during *voir dire*, in violation of the Maryland Declaration of Rights Equal Protection Clause and analogous federal constitutional law.
2. The trial court erroneously admitted the testimony of Charles Johnson, in violation of Mr. Conyers' Fifth Amendment Right Against Self-Incrimination, Fifth Amendment Right to

Counsel, and Sixth Amendment Right to Counsel.

3. The trial court erroneously permitted Monica Wilson to testify to Wanda Johnson's statement that she had Twenty Dollars on her person the night of her murder.
4. The trial court failed to strike, *sua sponte*, the trial testimony of Monica Wilson that Mr. Conyers told her while he was incarcerated that he had two .38 handguns.
5. The trial court failed to allow TC to offer a companion statement by Mr. Conyers to Monica Wilson to the effect that he did not have the two .38 caliber handguns in his possession at the time of the murders.
6. The trial court erroneously permitted Monica Wilson to testify to prior bad acts of Mr. Conyers.
7. The trial court erroneously barred questioning by TC regarding Monica Wilson's drug use, during both direct and cross examination.
8. The trial court erroneously barred questioning by TC regarding Lawrence Bradshaw's occupation, during both direct and cross examination.
9. The trial court failed to declare a mistrial after numerous audible comments were made by Wanda Johnson's family during trial.
10. The trial court erroneously permitted prejudicial crime scene and autopsy photographs to be admitted into evidence.
11. The trial court failed to order, *sua sponte* the jury to leave the courtroom during bench conferences

when the jury could overhear the conferences while they were seated in the courtroom.

12. The trial court failed to admonish counsel for the State and to strike from the record numerous improper statements by counsel for the State during closing argument.
13. The trial court failed to provide, *sua sponte*, a limiting instruction to the jury regarding the admission of Charles Johnson's testimony that Mr. Conyers said that he and Lawrence Bradshaw intended to rob people after Wanda Johnson's murder.
14. The trial court erroneously permitted Charles Johnson to testify to the fact that Mr. Conyers said that he and Lawrence Bradshaw intended to rob people after Wanda Johnson's murder.
15. The trial court erroneously denied Mr. Conyers' severance motion.
16. The trial court failed to provide, *sua sponte*, jury charges directing the jury to limit consideration of the Bradshaw murder in deciding Mr. Conyers' guilt on the Wanda Johnson charge to consciousness of guilt and directing the jury not to consider the Bradshaw murder as evidence of propensity. The trial court also failed to provide an instruction directing the jury to consider each charge separately.

D. <u>Court Error at Sentencing</u>

1. The trial court improperly restricted the direct examination of Arthur Rogers, Ventura McLee, and Eric Spencer.

2. The trial court permitted the introduction of evidence of improper victim impact evidence at sentencing.
3. The trial court erroneously allowed into evidence both testimony as to the good character of the victim and evidence that Mr. Conyers had received a death sentence previously in this case which resulted in a new sentencing which exacerbated the family's grief.
4. The trial court erroneously permitted Detective Marll to testify as to the truthfulness of Charles Johnson.
5. The trial court improperly permitted the admission of other crimes evidence during the testimony of Monica Wilson and failed to issue, *sua sponte*, a jury instruction on the use to which such testimony could be put by the jury.
6. The trial court erroneously allowed the robbery aggravating circumstance to be submitted to the jury absent sufficient evidence that a robbery occurred.
7. The trial court improperly permitted evidence as to Mr. Conyers' prior conviction of the Lawrence Bradshaw murder, and the admission of that evidence without any limiting instruction to the jury.
8. The trial court erred in permitting the State to present improper closing argument to the jury.
9. The trial court erred in submitting to the jury a sentencing form which improperly limited their consideration of mitigation to "evidence."
10. The trial court submitted an improper sentencing form to the jury.

11. The trial court erred in failing to sufficiently *voir dire* prospective jurors as to their views on the death penalty and their ability to give equal consideration to all of the sentencing options.
12. The trial court erred in permitting the same errors that occurred during the guilt/innocence phase of the trial, including the court's failure to address, *sua sponte*, the jury's ability to overhear bench conferences and audible comments made by the audience.
13. The trial court denied Mr. Conyers his right to confront and cross examine evidence against him, his right to be present and participate in his capital sentencing proceeding, and his right to due process by hearing substantive argument and ruling on a critical evidentiary matter in the absence of Mr. Conyers during an unrecorded conference in chambers.

E. <u>State Violations of Due Process</u>

1. In violation of the Fifth and Fourteen Amendments, as well as Article 24 of the Maryland Declaration of Rights and the State's statutory and legal obligations, the State failed to turn over to the Petitioner evidence of Charles Johnson's involvement and cooperation in the prosecution of Martin Quincy Johnson.
2. In violation of the Fifth and Fourteenth Amendments, as well as Article 24 of the Maryland Declaration of Rights and the State's statutory and legal obligations, the State failed to turn over to the Petitioner evidence regarding potential witness Katherine Hadel and her failure

to identify the Petitioner as the male with Lawrence Bradshaw shortly before his murder.

3. In violation of the Fifth and Fourteenth Amendments, as well as Article 24 of the Maryland Declaration of Rights and the State's statutory and legal obligations, the State failed to disclose its complete agreement with Deborah Myers prior to trial.
4. In violation of the Fifth and Fourteenth Amendments, as well as Article 24 of the Maryland Declaration of Rights and the State's statutory and legal obligations, the State failed to turn over to the Petitioner the fact that State witness Charles Johnson had requested a "deal" when he met with police to discuss the Petitioner's involvement with the Wanda Johnson and Lawrence Bradshaw murders.
5. In violation of the Fifth and Fourteenth Amendments, as well as Article 24 of the Maryland Declaration of Rights and the State's statutory and legal obligations, the State failed to disclose to the Petitioner that a number of statements made by Charles Johnson contained in his written statement could not be verified and were, in fact, disproved.

F. <u>Additional Claims of Error</u>

1. The Maryland Death Penalty Statute denies the sentencer full freedom to assess and weight relevant mitigating evidence in violation of the Fourteenth Amendment rights to due process and equal protection; the Sixth Amendment rights to effective assistance of counsel, the confrontation of witnesses and an impartial jury; and the

Eighth Amendment right against cruel and unusual punishment as well as Defendant's rights under Articles 16, 21, 23, 24 and 25 of the Maryland Declaration of Rights.

2. Maryland's method of execution is unconstitutional:
   a. Maryland's lethal injection statute violates the Eighth Amendment and Articles 16 and 25 of the Maryland Declaration of Rights because it fails to minimize the risk of error associated with lethal injection.
   b. The Maryland Lethal Injection Statute offends evolving standards of decency because it conflicts with current standards of medical ethics.
   c. The Maryland Lethal Injection Statute unconstitutionally delegates legislative power to the Commissioner of Correction.
3. Maryland's capital sentencing scheme is unconstitutional as applied to defendants convicted of felony murder, and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Articles 16, 21, 24 and 25 of the Maryland Declaration of Rights, and applicable federal and state law.
4. Maryland's capital sentencing proceeding employs a burden of proof that permitted Mr. Conyers to be sentenced to death upon a jury's finding that aggravating circumstances outweighed mitigating circumstances by a preponderance of the evidence in violation of the

Supreme Court's recent holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

5. TC and AC were ineffective for failing to raise the *Apprendi* argument.
6. TC failed to request a pretrial hearing challenging identification of Petitioner's car.

G. ISSUES RAISED IN SUPPLEMENT TO AMENDED PETITION

1. Trial counsel failed to object to improper statements by the State in closing arguments regarding the testimony of Chrissy Harding and Christy Collison as being unimpeached and that facts provided by Charles Johnson to the police were not on TV.
2. Counsel were ineffective for successfully managing to limit testimony from Detective Marll.
3. Counsel were ineffective for failing to object to the absence of Petitioner from a chambers' conference.

H. STATE VIOLATION OF DUE PROCESS

1. Widespread violations of due process based on assertions of discovery violations by failing to provide exculpatory impeachment information.
2. The State failed to correct false testimony of Charles Johnson and Detective Marll.
3. The State failed to correct Detective Marll's testimony that he knew and could verify facts he knew to be true provided by Charles Johnson.
4. A number of facts in Charles Johnson's statements were not verified.

I. COURT ERROR AT SENTENCING

J. ISSUES RAISED IN SECOND SUPPLEMENT TO AMENDED PETITION

1. In light of *Aprendi v. New Jersey*, the Court should find the Maryland death penalty procedure to be unconstitutional.
2. All trial and appellate counsel were ineffective for failing to raise the improper standard of proof issue in the weighing process.
3. Trial counsel should have asked for a pretrial hearing to challenge the admissibility of the identification of a car in a one-photo show-up.

The Petitioner seeks as relief:

1. A hearing on this matter.
2. His presence at all hearings by this Court concerning these allegations.
3. A new trial.
4. Vacation of his current sentence.
5. Leave to freely amended this Petition; and
6. Such other relief as law and justice may require.

Four (4) days of hearings were held in open court, with Petitioner present and represented by eminently qualified counsel appointed by the Public Defender's Office. Petitioner freely amended his Petition.

STATEMENT OF FACTS[3]

At approximately 9:35 p.m., on Friday, October 21, 1994, Petitioner's estranged girlfriend, Monica Wilson, went to visit her mother, Wanda Johnson, at the home Ms. Johnson shared with her husband, Elwood Johnson. Ms.

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[3] This Statement of Facts is from *Conyers II*.

Wilson had just spoken with her mother at 9:00 p.m. that evening, and her mother had agreed to babysit for Ms. Wilson's son. Arriving with Ms. Wilson at the Johnson home was her cousin, Carla Clinton.

As the two women approached the Johnson home, they saw someone looking outside through a second floor bedroom window. The women knocked on the door, and, as they waited for someone to open it, they saw through a window a man walking down the stairs. The women saw this man turn off the lights inside the house and duck down as if to avoid being seen. The two women walked to a back door and knocked on it. The women heard sounds of a struggle, described as a "commotion," "tussling" and "fighting," coming from inside the house. Then Ms. Johnson began to scream, and a window on the second floor broke over the women's heads.

The two women fled to the home of a relative who lived nearby and called the police. On the way to the relative's house, Ms. Wilson noticed a car parked across the street from her mother's house. The car resembled one that Petitioner sometimes borrowed from his former girlfriend and mother of his child, Debra Meyers. Upon returning to the Johnson home, Ms. Wilson was informed by the police that her mother was dead.

There were no signs of forced entry into the Johnson home. Wanda Johnson's body was found in the master bedroom. She had been shot three times in the head, once in the back, and once in the arm. It was Ms. Johnson's custom to keep a small amount of money in her wallet. Furthermore, when Ms. Wilson spoke to Ms. Johnson earlier that evening, at approximately 9:00 p.m., Ms. Johnson said that she had twenty dollars. Ms. Johnson's open wallet was found atop her dresser in the master

bedroom; there was no money in the wallet. In the den, a door to a closet had been forced open, revealing a safe. The closet door had a hasp and a lock on it for security, but the hasp and lock had been pried out of the door jamb to gain access to the closet. Pulling the hasp out of the door jamb had caused splinters to fall on the floor around the closet. The safe inside the closet was closed. Mr. Johnson opened the safe the day after his wife's murder; it contained fifteen dollars.

The next day, Ms. Clinton worked with a police artist on a sketch of the man she had seen on the staircase inside the Johnson home the evening before. Ms. Wilson was asked to look at the sketch that had been made based on Ms. Clinton's description. Petitioner, who had come to the police station to keep Ms. Wilson company, took the sketch away before Ms. Wilson had a chance to see it, telling the police that the sketch would upset her. When Ms. Wilson finally had a chance to see the police sketch, she did not immediately identify Lawrence Bradshaw as the man depicted in the sketch. She made a photo identification of another man, who was arrested and incarcerated for a brief time as a result. Ms. Wilson later agreed, however, that the police sketch looked like Lawrence Bradshaw.

Shortly after 1:00 a.m. on October 23, 1994, approximately 27 hours after the murder of Ms. Johnson, Lawrence Bradshaw was shot in the 4300 block of McDowell Lane. This street is located in the Lansdowne area, near Debra Meyers's home. Mr. Bradshaw had been shot three times in the head, once in the back, once in the arm, and once in the finger. Mr. Bradshaw was taken to Shock Trauma, where he died the following day. *Conyers I*, 345 Md. at 534-36, 693 A.2d at 785-86.

As to Johnson, Petitioner was convicted of premeditated murder, felony murder, first-degree burglary, robbery with a deadly weapon, attempted robbery with a deadly weapon, robbery, attempted robbery, and use of a handgun in the commission of a crime of violence, and sentenced to death. With respect to Bradshaw, Petitioner was found guilty of premeditated murder and use of a handgun in the commission of a crime of violence, and sentenced to life without parole.

On appeal, the Court of Appeals found the evidence was insufficient to sustain Petitioner's conviction for the burglary of Johnson's home, but sustained the remaining convictions. Regarding sentencing, the Court of Appeals held that certain portions of Petitioner's juvenile record that were contained in the pre-sentence investigation (PSI) report should not have been presented to the jury because the material was considered "inflammatory and highly prejudicial." *Conyers I*, 345 Md. at 563, 693 A.2d at 799. Consequently, Petitioner was granted a new sentencing hearing.

At the second capital sentencing hearing, during the State's case, Charles Johnson (no relation to the victim, Wanda Johnson, or her husband) testified that while he was Petitioner's cellmate at the Baltimore County Detention Center in October-November of 1994, Petitioner discussed the robbery at Johnson's home. Charles Johnson stated Petitioner told him that he and a person named "Molek" went to Wanda Johnson's house and Petitioner went upstairs to rob a safe. Charles Johnson testified:

> "During the robbery, someone came to the door. At that point, Ms. Johnson yelled out . . . her daughter's name or something of that nature. And

> Clarence panicked, because, I guess, they would recognize him is what he said, and as a result, he wound up shooting Ms. Johnson."

Charles Johnson went on to state that Petitioner told him that while both he and "Molek" were upstairs at first, when they heard noise, "Molek" ran downstairs. After Johnson was shot, "Molek" ran but Petitioner waited until no one was outside before he left.

Wanda Johnson's husband, Elwood Johnson, testified that Petitioner was a frequent visitor to their home. He also described the layout of the home, providing specific details about a spare bedroom that contained a safe in a closet. The safe, which contained personal papers and petty cash, had a combination lock and the closet was secured with a lock and hasp. Mr. Johnson stated that earlier in the day, the safe and closet were in normal condition but when he returned after the shooting the closet had been forced open and the hasp was broken. Furthermore, his wife's wallet was lying open on a dresser in their bedroom, which normally would have been inside her purse and placed in a cabinet or dresser drawer.

Wilson, the victim's daughter, basically recapped her trial testimony, describing her past relationship with Petitioner, her arrival at her mother's home with her cousin and son, hearing noise and her mother's screams, fleeing the scene and going for help down the street, and finally being informed of her mother's murder. Wilson also testified to Petitioner's efforts to prevent her from seeing the composite sketch of Bradshaw that her cousin helped develop and to keep her from reading or viewing any news related to the murder. Wilson stated Petitioner knew about the safe in her parents' spare bedroom and that he was aware her mother was not normally home on

Friday evenings. Wilson knew that Petitioner owned a .38 caliber pistol, the type of weapon used to kill her mother.

Carla Clinton, Wilson's cousin who was with her at the crime scene, also repeated her trial testimony as to going to the Johnson house, seeing someone downstairs, hearing noise and her aunt's screams from inside the house, and finally assisting the police in the development of a composite sketch of the person she saw in the house.

Also during the State's case, a stipulation was presented to the jury regarding the recovered cartridges and the fact that they were all fired from a .38 caliber handgun. In addition, Victoria Gibson, the victim's sister, testified as a victim impact witness, describing her sister's nature and personality and the warm relationship she had with her entire family. Furthermore, Petitioner's PSI report, which was redacted to the satisfaction of both the State and defense, was introduced into evidence.

During the defense's case, Arthur Rogers testified that he was incarcerated with Charles Johnson during October 1994 and at one point he discovered Johnson "rifling through my charging documents." Ventura McLee testified that he was incarcerated in October 1994 with Petitioner and Charles Johnson. During this period, Charles Johnson showed McLee indictment papers, police reports, and photographs relating to Petitioner's case. Timothy Wren testified that while he was incarcerated with Charles Johnson during August and October 1994, Charles Johnson told him that he had seen Petitioner's charge papers, that he had heard Petitioner talk about the case in his sleep, and that Petitioner had confessed his guilt. Eric Spencer, who resided in the cell next to Charles Johnson and Petitioner in October 1994, testified that he

never heard Petitioner discussing his case with Charles Johnson.

Testifying as mitigation witnesses were Petitioner's parents, Clarence Conyers, Sr., and Eleanor Conyers, as well as Reverend William Felder. Petitioner exercised his right of allocution, stating that he "had no involvement in this crime whatsoever."

Additional facts will be provided as necessary as they relate to the respective issues that follow.

DISCUSSION[4]

1. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Petitioner must show that:

a. counsel's performance was deficient; and

b. the deficient performance prejudiced the defense. *Harris v. State*, 303 Md. 685 (1985) explaining *Strickland v. Washington*, 466 U.S. 668 (1984) (emphasis in original);. *Bowers v. State*, 320 Md. 416, 424 (1990).

To satisfy the first requirement, deficient performance, Petitioner must:

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[4] This Memorandum will address the allegations of Petitioner in the order set forth in the "Amended Petition for Post Conviction Relief" filed September 14, 2000 (which repeats the allegations from the original Petition and inserts additional allegations), the "Supplement to Amended Petition for Post Conviction Relief" filed October 25, 2000, and the "Second Supplement to Amended Petition for Post Conviction Relief" filed December 1, 2000.

a. identify certain unreasonable acts or omissions by counsel;
b. show that under prevailing professional norms, counsel's representation fell below an objective standard of reasonableness; and
c. overcome the presumption that the challenged action might be sound trial strategy.

Harris, 303 Md. at 699. To satisfy the second requirement, prejudice, the Petitioner must show that counsel's errors were so severe that they deprived Petitioner of a fair trial, a trial whose result is reliable. *Id.* Or, that "there is a reasonable probability that, but for counsel's errors, the result would have been different. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In *Bowers v. State*, 320 Md. 416 (1990), the Court of Appeals reaffirmed its adoption of the standards set forth in *Strickland* and *Harris*.

> The tests are set forth in *Strickland v. Washington, supra*. We reviewed and applied them most recently in *State v. Colvin*, 314 Md. 1, 548 A.2d 506 (1988), where Judge Rodowsky, for the Court, noted that they had been "painstakingly analyzed" by Judge Orth in *Harris, supra*, and "distilled" by Chief Judge Murphy in *Tichnell, supra*. *Colvin*, 314 Md. at 5-6, 558 A.2d at 508. Since *Strickland*, the Supreme Court also has revisited the area. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), and *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). See also *Perry v. Leeke*,488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).

Bowers, 320 Md. at 423.

In evaluating whether a Petitioner has met his burden with regard to the deficiency prong, it is necessary for a reviewing court to place itself in the position of counsel at the time of counsel's conduct. A reviewing court may not judge the conduct of counsel with the benefit of hindsight and may not consider, in assessing performance, the results that the performance attained. *Harris*, 303 Md. at 698 n. 7.

Thus, a finding of ineffective assistance of counsel may not be predicated upon a strategy decision, unless that decision was totally unreasonable. *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987). Further, the Court of Appeals has stressed that a Petitioner "must overcome a presumption that the alleged acts or omissions might be the result of sound trial strategy." *Tichnell*, 509 A.2d at 1179. The Court of Appeals has stressed that the reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 1187.

If a Petitioner is able to meet the deficiency prong, he must then establish that counsel's conduct prejudiced his defense. To satisfy this prong of the *Strickland* analysis, a Petitioner must demonstrate "that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is not reliable." *Strickland*, 446 U.S. at 687. A reviewing court must be convinced that, but for counsel's acts or omissions, there is a "substantial possibility" that the result of the trial would have been different. *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990). A Petitioner must do more than "show that the errors had some conceivable effect on the outcome of the proceeding, or that the errors impaired the presentation of

the defense." *Harris*, 303 Md. at 799. (Emphasis in original.)

At the trial on the merits and the first sentencing, Petitioner was represented by Roland Walker and Lisa Sansone. Mr. Walker has been in practice for forty-six (46) years. He estimates that ninety-five percent (95%) of his practice is criminal defense. He has represented hundreds of clients charged with murder as the lead attorney. A full review of the transcript of the trial demonstrates Mr. Walker's unquestionable ability as an effective advocate in this case.

Mr. Walker brought on Ms. Sansone because of his knowledge of her abilities and "brilliance" when it comes to research and issues of law. Ms. Sansone's role in the case was well defined. A full review of the transcript shows her abilities on issues or law.

Trial counsel clearly chose a well prepared attack in defense of the Petitioner. Their efforts were clear in attempting to limit or suppress evidence. In the presence of the jury, Mr. Walker and Ms. Sansone were consistent in their defense strategy to stress the State's clear burden of proof and to suggest that Lawrence Bradshaw was the sole person responsible for the murder of Mrs. Johnson.

On appeal, the Petitioner was represented primarily by Michael Braudes with the Appellate Division of the Public Defender's Office for over twenty (20) years. He has handled eight hundred (800) to nine hundred (900) appeals, including ten (10) to fifteen (15) death penalty cases. He trains the other attorneys in capital appellate work and published a manual on the death penalty.

A. Ineffective Assistance of Counsel at Guilt/Innocence Phase

A1. Petitioner alleges that trial counsel was ineffective for failing to show "with available evidence" that he was intentionally placed together with Charles Johnson to gather evidence against the Petitioner. The evidence presented at the Post Conviction Hearings[5] failed to support this allegation.

The testimony at the Hearing established that no one ever requested either the Petitioner or Charles Johnson to be placed near each other.

The record of the original trial reflects efforts by trial counsel to uncover such an act if it had occurred. In addition to cross-examination of Charles Johnson, counsel also subpoenaed and researched files and logs of the Detention Center regarding Charles Johnson.

Counsel cannot be considered ineffective for failing to unearth facts which are non-existent. Petitioner offered no evidence to support this factual allegation.

A2. Petitioner alleges that trial and appellate counsel all failed to raise a "federal constitutional claim" at trial and on appeal regarding the issues of severance. Petitioner has not cited a single case based on federal constitutional law which differs in any way from Maryland law on the issue of severance.

The law cited by counsel at the original Motion to Sever and on appeal is well established in Maryland. A review of the case law shows no conflict with any portion of the U.S. Constitution or any case law interpreting it.

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[5] The term "Hearing" will be used herein to refer to this Post Conviction proceeding.

Petitioner has shown no prejudice for failing to assert such a claim.

A3. Petitioner alleges that counsel "failed to develop evidence before trial" that Lawrence Bradshaw possessed a firearm at the time of his death. There has been no evidence to support such an assertion. At the hearing, Officer McTamany testified that he was at or near the body of Lawrence Bradshaw from the scene to the hospital, and eventually to the Medical Examiner's Office. Neither he nor anyone in his presence recovered a gun. He was given the belongings of Mr. Bradshaw at the hospital. He was not given a gun. Searches of the scene, including a sweep by a gun dog, were unsuccessful in the recovery of a gun. This allegation is without merit.

A4. Petitioner alleges that trial counsel could have learned that Charles Johnson "provided information" to the State regarding a Martin Quincy Johnson and that, in September, 1995, was produced to testify in the Martin Quincy Johnson prosecution.

The only evidence on that issue is a clerk's worksheet containing a handwritten notation that Charles Johnson was a witness in *State v. Martin Johnson*. All of the other evidence demonstrates that this notation is a "clerical error." The affidavit from Catherine Curran O'Malley, A.S.A, shows that Charles Johnson has no involvement in *State v. Martin Quincy Johnson*. He did not provide information nor did he testify in the case. In fact, Martin Quincy Johnson plead guilty. The docket entries for Case Number 95CR1190 show that no writ was issued for Charles Johnson to be produced as a witness.

A co-defendant of Charles Johnson happened to be on the same docket, before the same judge, on the same day as Martin Quincy Johnson. Charles Johnson had been

produced to Judge Bollinger's courtroom by a Writ of Habeas Corpus requested by the Defendant in *State v. Brenda Faye Williams*. The affidavit from Robin Coffin, A.S.A., establishes that Ms. Williams was a co-defendant of Charles Johnson. A review of the docket entries demonstrates the writ for Mr. Johnson's production.

Petitioner's assertion is unsupported by evidence. Counsel cannot be ineffective for failing to discover matters which are non-existent.

A5. Petitioner alleges that trial counsel failed to learn that Katherine Hadel had been shown a photo spread and failed to identify the Petitioner. Katherine Hadel was interviewed near the scene of the Bradshaw murder. Ms. Hadel and Christina Church had apparently conversed with Mr. Bradshaw and his companion shortly before Mr. Bradshaw's death.

The allegation that Ms. Hadel was shown a photo array is contradicted by every piece of evidence other than the testimony of Katherine Hadel. Ms. Hadel, at the Hearing, identified Detective Rubie, Officer McTamany and Officer Dennis as the three (3) people who came to her with a photo array. Detective Rubie was a crime lab technician at the scene whose only involvement was to process the crime scene. He testified he had nothing to do with any follow-up investigation. Officer Dennis' role was to assist with Ms. Hadel and Ms. Church at the precinct on the night of the shooting. He testified he had no other involvement and did not have any re-contact with Ms. Hadel. Officer McTamany assisted the Homicide Detectives in the investigation but testified he had no contact with Ms. Hadel and did not show a photo array to her.

Petitioner alleges that "(p)hoto spreads were shown to a number of witnesses involved in the Bradshaw investigation." This is unsupported by evidence. One (1) photo spread was shown to one (1) witness (Stephen Tate). Petitioner asserts that it would be illogical that the police did not show a photo array to Ms. Hadel. According to the evidence, the police had developed Clarence Conyers as a strong suspect from much more reliable means within days of the murder. This included Stephen Tate, Debra Meyers and Steven Johnson.

Ms. Hadel, at the Hearing, identified one (1) of three (3) possible photo arrays as the one (1) shown to her. The photo array she chose was put together by Detectives Marll and Tincher in the investigation of the Wanda Johnson murder. That array was only shown to the daughter and niece of Mrs. Johnson. The array contained a photograph (among others) of Michael Valentine, the original suspect in the Wanda Johnson murder. Conyers was not in that array. The array was never used in the Bradshaw investigation.

The evidence is clear that no such event occurred with Ms. Hadel. In addition, the array Ms. Hadel says she saw did not include Clarence Conyers. Therefore, she never "failed to identify" Clarence Conyers. Because it never happened, counsel cannot be considered ineffective for failing to discover this fact.

In addition, Petitioner has failed to show that the failure of trial counsel may very well have affected the result.

A6. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A7. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A8. Petitioner alleges that trial counsel was ineffective for failing to object to Monica Wilson's testimony concerning her mother's statement that she had $20.00 shortly before her death.

At page 311 of the Trial Transcript from January 22, 1996, Ms. Wilson testified:

> "I asked her did she want me to bring her something to eat because I told her I didn't have any money. I asked her, did she have some? She told me she had $20.00. She told me to get something. I told her I would have to borrow the money from Carla. Once I said that, she said that's okay, she said she would just wait for me to bring my son out to there then she will cook him something to eat."

Petitioner asserts that the "inadmissibility of the testimony about the $20.00 is clear." The statement is or could be interpreted to be a present sense impression. Mrs. Johnson either had an ongoing awareness of her possession of $20.00 and, therefore, mentally perceived a current, ongoing event, or she looked when her daughter asked and physically perceived her possession of $20.00. Under either scenario, the statement reflects a perception of a current event. *Booth v. State*, 306 Md. 508 A.2d 976 (1986) makes it clear that Maryland not only recognized a present sense impression exception to the hearsay rule but also makes it clear that it exists because of the spontaneity of the statement and the lack of an opportunity for reflection or fabrication.

In this case, the question from Ms. Wilson prompted Mrs. Johnson's immediate perception, as reflected in her statement, that she possessed $20.00. There is no reason to question the credibility of such a statement in this setting. She responded without a reason or opportunity to fabricate.

This issue is not one which rises to the level of ineffective assistance of counsel on either prong.

Even if the statement were inadmissible, the failure to object appears to have been a tactical decision. The trial transcript, the testimony of Roland Walker at the hearing and even the concession of Petitioner in the Memorandum of Law all make abundantly clear that trial counsel's defense strategy was to assert that Petitioner was not present at the time of Wanda Johnson's murder. The defense asserted that Bradshaw was solely responsible for Mrs. Johnson's killing. It was practically conceded that Mrs. Johnson was murdered in the course of a robbery. It would have been illogical and counter productive for counsel to suggest otherwise.

Therefore, there was no reason for trial counsel to be concerned with the statement of Mrs. Johnson that she possessed $20.00 shortly before her murder. The actions of trial counsel did not fall below the standard expected of competent counsel.

In addition, the Petitioner was not prejudiced by counsel's election not to challenge the admissibility of the statement. The Petitioner was convicted of first degree murder as premeditated, willful and deliberate and under the Felony Murder Doctrine. The statement of Mrs. Johnson did not affect either theory of first degree murder. It is clear that a robbery was in progress (whether completed or not) when Mrs. Johnson was killed. The

actions are sufficient to constitute felony murder. (Article 27, Section 410). In fact, the jury convicted Petitioner of attempted robbery and attempted robbery with a dangerous and deadly weapon, as well as robbery and robbery with a dangerous and deadly weapon. Clearly the statement of Mrs. Johnson was unnecessary for the attempt convictions.

At the second sentencing proceeding two (2) years later before a different jury the aggravating circumstance was that a murder occurred in the perpetration of a robbery or attempted robbery. The evidence presented at sentencing established one or both options. The testimony at the trial on the merits had no impact on the trial judge's rulings at the second sentencing.

The evidence of the $20.00 statement was not presented to the sentencing jury.

Furthermore, the $20.00 testimony was not the only evidence that a robbery occurred. The Court of Appeals noted other relevant evidence in addressing the sufficiency of the evidence argument. This included the evidence that Mrs. Johnson regularly kept her wallet in her purse and stored out of sight. Mrs. Johnson had a habit of carrying money. However, her wallet was found, opened and empty of cash, on top of her dresser.

Petitioner also asserts that Mr. Braudes was ineffective for failing to raise the $20.00 testimony on appeal as plain error. Mr. Braudes logically and reasonably explained at the hearing that he didn't feel the issue was sufficient for the Court of Appeals to consider it plain error. He distinguished the issue from others which he felt to be more egregious and therefore stood a better chance of success as plain error. Mr. Braudes' actions were well reasoned and well within the standard of competence. In addition, there is no showing of

prejudicial effect as explained above with regard to trial counsel.

A9. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A10. Petitioner alleges that trial counsel "failed to object when the trial court curtailed defense questions to Monica Wilson regarding her drug use," suggesting that Monica Wilson had a motive to cooperate with law enforcement to prevent the FBI (her employer) from finding out about her drug use. This is belied by the fact that Detectives Marll and Tincher were informed about her drug use and that the information was apparently passed to the FBI. Petitioner has failed to show that Ms. Wilson would acknowledge such a motive.

More compelling, however, is the fact that trial counsel <u>was</u> able to establish the existence of Ms. Wilson's drug use (see Transcript of Proceedings, January 23, 1996, page 40) and that she worked for the FBI (page 41). Absent an acknowledgment of such a motive by Ms. Wilson, counsel already laid the foundation to argue such a motive.

Further, the Petitioner alleges counsel "failed to object." In fact, the cross-examination by Mr. Walker was objected to by the State. Counsel proffered the proposed testimony and the trial judge sustained the objection. Counsel did nothing which was in error.

Even if a deficient act were present, there was no prejudicial effect.

A11. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A12. Petitioner alleges that trial counsel failed tb object to testimony by Monica Wilson regarding drug use and violence between herself and the Petitioner.

The Court of Appeals directly addressed this issue in the appeal of the original conviction. In *Conyers 1*, at 562-563, the Court considered the precise issue and, despite the failure to preserve the issue, the Court stated "we would find no error if the issue were presented." Trial counsel could not be considered to be deficient if the admission was not error.

The Court of Appeals also stated "(w)e think it highly unlikely that Ms. Wilson's statements prejudiced the jury." The actions of counsel would not have affected the result.

A13. Petitioner alleges that trial and appellate counsel did not raise a federal constitutional claim in their effort to offer hearsay statements about the Petitioner not possessing firearms at the time of the murder.

Trial counsel attempted to offer the evidence, appellate counsel raised the issue on appeal and the Court of Appeals rejected the efforts. Furthermore, Petitioner failed to identify a distinction between Maryland and federal law on this issue.

A14. Petitioner alleges that counsel "failed to object: when the trial court barred him from eliciting testimony about the "occupation" of Lawrence Bradshaw. Since Petitioner's trial counsel offered the evidence, he was not the person to "object".

In addition, counsel actually did ask Tara Foote what Lawrence Bradshaw "did for an income." (See Transcript, January 23, 1996 at Page 165). This allegation is without merit.

A15. Petitioner alleges that trial counsel failed to state in "federal constitutional terms" his objection to testimony by Clarence Johnson about what Petitioner claims was an intention to rob people by Petitioner and Bradshaw. He also asserts that counsel failed to request a limiting instruction.

The testimony was that Petitioner and Bradshaw "were supposed to meet up to hustle." There was no statement of intention to rob. The Court of Appeals, in addressing the issue, stated "(t) he word "hustle" would not necessarily be understood by the jurors to mean a robbery." *Conyers l*, supra at 561. The Court also found that the reference was brief and not repeated.

Petitioner has never asserted any federal constitutional claim distinguishable from Maryland law. In addition, a limiting instruction would only highlight the issue for the jury or inform the jury that "hustle" is street lingo for robbing people.

Trial counsel objected and moved for a mistrial. He acted appropriately and competently. In addition, if there were error, the error would not have affected the result.

A16. Petitioner alleges Mr. Braudes failed to raise a federal constitutional claim on the issue raised by trial counsel in A15. Petitioner asserts no violation of the U. S. Constitution specific to this issue. There is no law applicable for Mr. Braudes to cite. The Court of Appeals addressed and rejected the issue.

A17. Petitioner alleges trial counsel failed to interrogate Charles Johnson at trial regarding instances of dishonesty and false statement. Petitioner does not set forth any specific areas of inquiry which Mr. Walker should have utilized at trial on the merits. In the Memorandum of Law,

there are several areas noted which were presented at the Hearing.

a) "Charles Johnson Lied to His Employer, Murry's Steaks"

Counsel could not have either discovered or inquired about this matter. All the facts regarding Murry's Steaks and Charles Johnson's employment occurred after the trial on the merits. Charles Johnson's application is dated April 1, 1996, four months after the trial, which occurred in January of 1996.

b) "Charles Johnson's Prior Lies to the Police"

Petitioner asserts in his Memorandum of Law that Mr. Walker could have cross-examined Charles Johnson about his statements to the police when he was investigated in the Wendy's' robbery.

Petitioner has failed to show that Charles Johnson would have acknowledged that he lied to the police. In light of the comments Charles Johnson made at trial regarding the Wendy's robbery, it is more likely that he would have indicated his involvement in the Wendy's robbery was minimal, if at all. (See Transcript, January 24, 1996, pages 105-136, note page 135.)

Maryland Rule 5-608(b) permits inquiry in certain situations for truthful acts not resulting in conviction. The Rule also makes it clear that the "conduct may not be proved by extrinsic evidence." Had Charles Johnson minimized his involvement in the Wendy's robbery, counsel would be prohibited from offering any evidence beyond the cross-examination to rebut his answers. The jury would then be left with the impression that Charles Johnson received little, if any, benefit from his plea agreement.

Counsel's election not to inquire about Charles Johnson's statement to the police about the Wendy's robbery was sound trial strategy and did not fall below the level of competence expected of counsel.

Petitioner has not shown that failure to inquire may well have affected the result. Inquiry in the area would have been minimal when compared with the more significant areas of cross-examination, including the plea and cooperation agreement.

The State clearly demonstrated to the jury that Charles Johnson knew a significant number of unique details about the crime which he could have only learned from the killer. (See Transcript or Proceedings, January 24, 1996, starting at page 160 - Testimony of Detectives Marll and Bollinger.)

c) "Charles Johnson Failed to File Tax Returns"

Petitioner alleges that Charles Johnson lied on his application to Murry's Steaks and yet cites as truth the employment information Charles Johnson put on his application to assert that he failed to file tax returns.

There is no evidence that Charles Johnson failed to file tax returns when required to do so. The testimony showed that there were no W-2's filed by an employer in any year in which Charles Johnson did not file a return. No check was made under the name of Charles Johnson (without a middle name).

The only suggestion that Charles Johnson failed to file a return is his self-supplied employment history in the Murry's Steaks application which did not exist at trial in January, 1996. Counsel was not ineffective or incompetent for failing to see into the future.

d) "Charles Johnson Trolled for Information in the Detention Center to Provide to Police to Reduce His Sentence"

The allegations of Petitioner with regard to Martin Quincy Johnson are without foundation. This issue is addressed in A4. The evidence shows that Charles Johnson had no involvement in the Martin Quincy Johnson case.

The testimony showed that Martin Quincy Johnson sought the advice of an older inmate who reviewed the evidence and advised him to plead guilty ("to cop"). Charles Johnson could get no benefit for himself if the inmate pleads guilty. He had no involvement in the Martin Quincy Johnson case. (See Affidavits of Catherine Curran O'Malley, ASA, and Robin Coffin, ASA.)

e) "Charles Johnson Defied Lawful Police Instructions"

Petitioner alleges that counsel should have cross-examined Charles Johnson about his desire not to be arrested in a prior robbery. Charles Johnson was not convicted of resisting arrest. There was no ability to cross-examine on a non-existent prior conviction. Mr. Walker did cross-examine Charles Johnson on the robbery conviction arising out of that incident.

Rule 5-608(b) permits inquiry in an area "probative of a character trait of untruthfulness." Petitioner cites no Maryland authority that seeking to avoid arrest is probative of untruthfulness.

Petitioner has failed to demonstrate how Charles Johnson would have responded to such an inquiry if permitted. Counsel would not have been permitted to respond with extrinsic evidence.

Further, Petitioner has failed to show that the inquiry may well have affected the result.

A full reading of the cross-examination of Charles Johnson by Mr. Walker demonstrates his clear and effective abilities as an advocate for the Petitioner.

A18. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A19. Petitioner alleges Mr. Braudes failed to "continue to press timely objections raised at trial regarding photographs. The admission of crime scene and/or autopsy photographs is a matter within the sound discretion of the trial judge. *Johnson v. State*, 303 Md. 487, 495 A.2d 1. (1985). Judge Simpson applied the appropriate standard in ruling on the admission of the photographs. There is no showing that counsel would have been successful on appeal. Mr. Braudes appropriately chose the issues he thought most capable of success on appeal. This was not one.

A20. Petitioner withdrew this allegation in the Supplement to Amended Petition for Post Conviction Relief.

A21. Petitioner alleges that trial counsel was ineffective for failing to request an instruction limiting consideration of each murder to the other based upon the relevance stated in Judge Simpson's severance/joinder ruling. The implication is that Petitioner feels the jury should have been told by the trial judge that his participation in the Wanda Johnson murder is relevant and should be considered by the jury in finding a motive for the murder of Lawrence Bradshaw. In addition, the jury would be instructed that his participation in the Bradshaw murder

was relevant in the Johnson murder to show Petitioner's consciousness of guilt and destruction of evidence.

It is sound trial strategy not to provoke added emphasis to an issue which is harmful to the party. Without the instruction, counsel is free to argue regarding the separate status of each murder to the jury.

In addition, Petitioner has failed to show that such an instruction may well have caused a different result. At trial, there was clear, distinct evidence of each murder which was unique to each crime. Petitioner has conceded that there was sufficient evidence of the Bradshaw murder without the testimony of Charles Johnson. Petitioner has argued that the evidence of the premeditated murder of Wanda Johnson would be insufficient without the testimony of Charles Johnson. Although the sentence of death by this particular jury was reversed, on a separate issue, the jury found beyond a reasonable doubt that Petitioner was the principal in the first degree to Wanda Johnson's murder. This was after Judge Simpson told them to give no consideration to the murder of Bradshaw in making their finding at the capital sentencing phase. (See Transcript, January 26, 1996, page 7.)

Therefore, no evidence of the Bradshaw murder was necessary for the jury to find Petitioner guilty of the murder of Wanda Johnson. In fact, the resentencing jury found principalship in the first degree in the murder of Wanda Johnson without even knowing about the link to Bradshaw's death. It is obvious that each case was separately considered.

A22. Petitioner alleges that trial counsel failed to seek a jury instruction directing the jury to consider each charge separately. A full reading of the Court's instructions to the jury makes it apparent that the jury was adequately and

appropriately instructed. In addition, the verdict sheet in the case obviously required separate and distinct verdicts on each count. There was no deficient act by counsel by not requesting an additional instruction.

The failure to request such an instruction did not affect the verdicts for all the reasons stated in A21.

A23. Petitioner alleges Mr. Braudes was ineffective for failing to raise the lack of instruction as plain error by the Court. This is not the case. If Petitioner is correct that Maryland Rule 5-105 applies to the issue of joinder/severance, then the "Court upon request, shall . . . instruct the jury accordingly." (Emphasis added.) Since the instruction was not requested, the Court of Appeals could not conclude that the trial court committed plain error.

If Petitioner is incorrect and Maryland Rule 5-105 does not apply to the issue, then there is no need or even availability of a limiting instruction. Therefore, there would be no error by the trial court.

There are clearly tactical reasons not to request such an instruction and a trial court should not overbear appropriate tactics of a party.

Petitioner has failed to show that raising the issues as plain error may well have affected the result.

A24. Petitioner alleges trial counsel was ineffective for failing to object to comments made by the State in closing arguments to the jury. The law in Maryland on appropriate comments to the jury by the State is set forth in *Wilhelm v. State*, 272 Md. 404, 326A.2d 707 (1974), where the Court of Appeals held:

> "As to summation, it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and

> all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments."

The Court went on to state that a prosecutor "may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." Mr. Braudes was correct in his interpretation of *Wilhelm* when he testified at the Hearing.

a) The comments by Peter Johnson in closing argument about not leaving live witnesses, about the jurors being forty (40) feet from a cold-blooded killer and the fact that the Petitioner had "ice in his veins," are all flourish or metaphorical allusions which were based on the evidence that the Petitioner killed the mother of his girlfriend based upon greed and then murdered his accomplish [sic] when it appeared that the accomplice may be discovered.

The comment about being forty (40) feet away was a comment on the location of the guilty party and not designed to instill fear in the jurors.

b) The comment that the testimony of Chrissy Harding and Christy Collison was "totally unimpeached," was an accurate statement of the facts and well within the bounds of proper comment. In *Laws v. State*, 7 Md. App. 84, 253 A.2d 780 (1969), the prosecutor stated at closing argument that the testimony of an identification witness "was unequivocal and unshaken and unrebutted." The

Court found no error in the comment. The comment here is the same.

c) Petitioner alleges that there was no testimony about media coverage. In fact, Detective Marll testified about facts which were not available to the media. (See Transcript of Proceedings, January 24, 1996, page 177.)

d) The comments of the State regarding Charles Johnson's reliability were "reasonable and legitimate inferences" which could be drawn from the evidence based upon corroboration of the facts testified to by Charles Johnson and the opportunity of the jurors to observe the witness. It was for the jury to reach their own independent conclusion.

Petitioner's assertion that *United States v. Goff*, 847, F.2d 149 (5th Cir.), *cert. denied*, 488 U.S. 932 (1988), held a comment "he's telling the truth" to be "improper bolstering," is in error. In fact, the Fifth Circuit Court of Appeals stated the comment was bolstering (not improper bolstering) and found that it was not plain error.

e) Petitioner alleges that showing a crime scene photograph and making the comment, "(m)ake a decision you can live with the rest of your lives and find him guilty," was an improper appeal to the emotions of the jurors. In fact, the State never showed the photograph to the jury. The comment was a direct quote from the opening statement argument of Petitioner's counsel (see Transcript of Proceedings, January 22, and January 25, 1996, page 120).

Petitioner also asserts that Mr. Braudes should have raised the comments on appeal as plain error. Mr. Braudes logically and credibly explained at the Hearing that the comments had no chance of success on appeal based upon *Wilhelm*, supra.

Petitioner has not shown that the failure to object may well have affected the result.

A25. Finally, as to trial and appellate counsel, Petitioner argues that the cumulative effect of their alleged errors may cross the threshold of prejudice. This presumes that there were errors which fell below the proper standard of competence. Just because Petitioner makes a large number of allegations, does not mean error must be found.

B. INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL REGARDING SENTENCING PHASE

At the resentencing in 1998, Petitioner was represented by Philip G. Dantes and Beverly Wallace. Mr. Dantes was selected by the Chief of the Capital Defense Division of the Public Defender's Office to represent Petitioner. Mr. Dantes obtained permission to use his law partner (Ms. Wallace) as a second attorney on the case. Mr. Dantes had handled a number of prior murder cases and criminal jury trials. He was previously selected by the Public Defender's Office and successfully represented a defendant in a death penalty case in Howard County, Maryland. Mr. Dantes has been an Assistant State's Attorney where he was Training and Litigation Director. He was an Assistant Attorney General in Correctional Litigation. He was the Maryland Parole Commission Chairman. He ran the Criminal Justice Clinic at the University of Maryland where he is still an adjunct professor. He has also obtained specialized training in death penalty litigation.

B1. Petitioner alleges that Mr. Dantes, Ms. Wallace and Mr. Braudes all failed to argue at sentencing and on appeal that "hearsay is admissible in a capital sentencing proceeding." Petitioner argues that *Whittlesey v. State*,

340 Md. 30, 665 A.2d 223 (1995) holds that hearsay is admissible. In actuality, *Whittlesey* holds that hearsay may be admissible in the discretion of the trial court if the court finds the proffered evidence to be reliable and relevant mitigating evidence. The assertion by Petitioner presumes that the trial court is unaware of the law and could not correctly rule without specific guidance from the trial attorney.

In this case, Judge Simpson demonstrated throughout every proceeding both an excellent judicial demeanor and superb knowledge of the law. He never shied away from ruling on an issue just because a particular case was not cited to him. Ironically, as noted by the Court of Appeals, *Whittlesey* was cited to Judge Simpson at Motions on another issue. (See Transcript of Proceedings, January 17, 1998, page 11.)

Judge Simpson ruled as to each offered item of hearsay presented and correctly applied Maryland law in doing so. Just because counsel did not say the word *Whittlesey* does not mean that the Judge acted contrary to existing law. The proffered testimony of Arthur Rogers, Ventura McLee and Eric Spencer was not "reliable" hearsay and the evidence was not relevant "mitigating" evidence.

In Petitioner's appeal to the Court of Appeals, he asserted that the trial court erred in not admitting the proffered testimony of the witness. The Court of Appeals directly noted *Whittlesey* in its opinion in *Conyers II*. The Court, in addressing precisely this issue, sta[illegible] at Footnote 2:

> "Although the Maryland Rules of Evidence do not strictly apply in capital sentencing proceedings, we still look to the underlying

> evidentiary principals for guidance. As we stated in *Whittlesey v. State*. . . .

There is no question that the Court of Appeals ruled with full knowledge of *Whittlesey*. The alleged error of trial and appellate counsel did not fall below the standard expected of competent counsel.

The Court of Appeals, in *Conyers II*, found specifically that even if the statements offered through Arthur Rogers, Ventura McLee, and Eric Spencer were admitted, "the testimony would not have affected the ultimate outcome of the proceeding." *Conyers II*, at 161 and 166. This issue could not be any more clearly put to rest.

B2. Petitioner alleges that counsel was ineffective for failing to cross-examine Charles Johnson about statements made to Arthur Rogers and Ventura McLee. This is inconsistent with the previous allegation because Petitioner asserted the evidence should have been admissible as substantive evidence through Arthur Rogers and Ventura McLee. Petitioner's counsel even agreed at the Hearing while examining Mr. Dantes that that was the case.

As noted previously, even if the evidence was admitted for impeachment purposes, the evidence "would not have affected the ultimate outcome of the proceedings." *Conyers II*, at 161 and at 166.

B3. Petitioner alleges that counsel failed to cross-examine Charles Johnson regarding certain instances of dishonesty. It is apparent from the testimony of Mr. Dantes at the hearing and the transcript of the trial proceedings that counsel had chosen a well considered approach in their efforts to assist the Petitioner.

Petitioner stood convicted of the murder of Wanda Johnson. The only issues were whether Petitioner was a principal in the first degree and whether the murder was in the course of a robbery or attempted robbery.

Therefore, it stood to reason that a full frontal attack on Charles Johnson without regard to mitigating issues stood little chance of success. There was still no harm in pursuing *some* attack on Charles Johnson through cross-examination on his plea agreement and testimony of fellow inmates.

Mr. Dantes testified at the hearing that the primary aim of the defense was to convince the jurors that the Petitioner was not a future danger because of an already existing life without parole sentence. They interviewed innumerable witnesses, including family, and considered all options available to present mitigation.

a) Petitioner alleged that counsel should have somehow discovered and then cross-examined Charles Johnson about information related to his personnel file at Murry's Steaks. Counsel were well aware of the witness' prior criminal record, his plea agreement, and his statements or activities at the jail. They had reviewed Charles Johnson's base file at the jail and investigated his possible involvement in the Martin Quincy Johnson case.

Just because the Petitioner's current counsel was able to uncover a personnel file from one employer, doesn't mean that one who doesn't, has fallen below the commonly accepted standard for competent counsel.

In addition, Petitioner has failed to show how Charles Johnson would have responded to the inquiry regarding his application for employment. As noted earlier, Petitioner's trial counsel would be stuck with the

answer and would not have been permitted to offer extrinsic evidence.

Further, even if extrinsic evidence were permitted, the impact of this personnel file would have been insignificant or even harmful to Petitioner. The effort would show a person who did not volunteer his own criminal record in order to secure employment after his release from incarceration. A further review of his file shows that Charles Johnson has been an exemplary employee of Murry's and, in fact, aided his employer in detecting thefts by others from the company.

A review of the evidence in this case shows that this evidence would not have any affect on the outcome. The Court of Appeals, in *Conyers II*, wrote at some length about the evidence which corroborated Charles Johnson and the obvious reasoning of the jury. The Court found that further attacks of matters of greater significance than this issue would not have affected the result. Therefore, Petitioner suffered no prejudice from the alleged failure of trial counsel.

b) Petitioner repeats the assertion initially addressed to actions of Mr. Walker and Ms. Sansone, now directed to Mr. Dantes and Ms. Wallace, regarding failure to inquire about Charles Johnson's statements to the police about the Wendy's robbery.

This issue is addressed in A17(b) and is equally applicable to Mr. Dantes and Ms. Wallace.

In supplement to A17(b), this simply demonstrates that four (4) experienced and qualified attorneys elected not to pursue this area of inquiry. This Court also has the benefit of the analysis by the Court of Appeals in *Conyers II*, finding that further attacks on Charles Johnson would not have affected the outcome.

c) This issue is addressed in A17(c) and previously in this section in ruling on the assertion that counsel failed to inquire about Charles Johnson's tax filings.

d) This issue is addressed in A17(d) and previously in this section in ruling on the allegation that counsel failed to show that Charles Johnson "trolled for information in the Detention Center."

Further, it appears that counsel had found the clerk's worksheet which caused all of the confusion. Apparently, they figured out that it was a mistake and elected not to embarrass Petitioner's position with easily refutable evidence.

e) This issue is addressed in A17(e) and previously in this section in ruling on the allegation that counsel failed to cross-examine Charles Johnson on a prior "defiance of lawful police instruction."

B4. Petitioner alleges that trial counsel erred by not objecting to victim impact testimony offered by the State, advancing two (2) reasons. First, that Ms. Gibson made mention of good deeds by the victim before she was killed and, second, that Ms. Gibson allegedly told the jury that the Petitioner had been previously sentenced to death.

Petitioner cites no authority holding that mentioning good character and good deeds of the victim is not permitted in victim impact testimony. Since the United States Supreme Court reversed its position from *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 95 L.Ed.2d, 440 (1987) in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d, 720 (1991), the principles of victim impact, in terms of content, have remained the same. As stated in *Payne*, victim impact evidence "is designed to show . . .each victim's 'uniqueness as an individual human being.'" (*Payne*, supra, at page 823.) No one can

logically suggest that Ms. Gibson did anything but this, and appropriately so, in her testimony regarding her sister. Any objection by trial counsel to Ms. Gibson's testimony would have likely been overruled.

Petitioner's second assertion that Ms. Gibson testified that he had been previously sentenced to death was ruled upon by the Court of Appeals in *Conyers II* and found to be without merit. The Court stated, "Gibson's vague comment cannot be said to have conveyed to the jurors that appellant received the death penalty in a prior sentencing proceeding." (*Conyers II* at 179.)

Petitioner was not prejudiced because the Court of Appeals found the issue without merit.

B5. Petitioner alleges that counsel failed to present evidence of Mr. Conyer's close relationship with his family and the impact an execution would have.

Counsel had the benefit of favorable portions of the Pre-Sentence Investigation which set forth five (5) full paragraphs on the Petitioner's personal history, including a description of a stable family environment and his "close relationship with his son and daughter." Petitioner's mother testified before the jury and described the upbringing of Petitioner, the "very good relationship" with her son, that she talks to him everyday in jail, that his father, sisters, children and friends visit him weekly, that he is a very good father to his children and has stayed involved in their lives, that he maintained a good relationship with the mothers of his children, that he has a great relationship with nieces and nephews, that he has a very close relationship with his sisters and that the entire family is close.

There was no reason to question the integrity of Mrs. Conyers and, in fact, the State did not cross-examine her.

This is precisely what Petitioner now alleges counsel should have presented. The only other issue Petitioner raises is the potentially offensive question of the impact of the execution. The answer is obvious, no one can reasonably suggest that the jury would not know that Petitioner's family would be devastated by his death.

The testimony at the hearing demonstrates that counsel reviewed a social history of the Petitioner which is referred to as the NJIA. He made a reasoned tactical decision not to offer the evidence. Petitioner takes issue with counsel's failure to continue to shop social histories until they found one that would satisfy him. Instead, they elected to present the information to the jury through a much closer and more reliable source.

Counsel also sought and received an evaluation from a forensic psychiatrist. Counsel logically explained at the Hearing that presenting Dr. Siebert after the State put in little evidence of drug use would do more harm than good. Therefore, they made the tactical decision to not call him.

The decisions of Petitioner's counsel at sentencing were well-informed and well-reasoned. In addition, Petitioner has not shown that the alleged failings may well have affected the results.

B6. Petitioner alleges that counsel failed to object to argument by the State seeking to avoid its burden to prove principalship in the first degree. Trial counsel did not object because there was no such argument. At page 36 of the January 28, 1998, transcript, Mr. Johnson stated "(a)s the Judge explained to you, does that (the murder conviction) by itself mean principal in the first degree? No." The State never said that it did not have a burden on principalship. At page 91, the State said, "then we get to what we are really supposed to be deciding . . . who was

the person that actually shot Wanda Johnson?" There was nothing to which counsel could object.

The jury was fully and fairly instructed on their obligations and burdens of proof.

B7. Petitioner alleges that counsel failed to object to improper opinion evidence of Detective Marll. The Court of Appeals, in *Conyers II*, addressed this precise issue and stated:

> "For those reasons, Marll's rebuttal testimony regarding the information Charles Johnson provided the State did not invade the province of the jury . . . we hold that Appellant was not deprived of a fair hearing by Marll's testimony. . . ." (At page 154)

The evidence was in the form reasonably preferred by counsel who had learned from Mr. Walker that he considered the most devastating part of the trial to be when Detective Marll testified to a significant number of accurate details provided by Charles Johnson which he could not have known but from the killer.

Mr. Dantes did an excellent job in getting the State to capsulize the previously devastating testimony into a momentary, generalized answer with no details. This was far from incompetent.

B8. Petitioner alleges that counsel failed to object to the admission of other crimes evidence from Monica Wilson, which he asserts was "completely inadmissible and highly prejudicial." This is the same testimony that the Court of Appeals called "not significantly prejudicial, and, . .. reliable information . . . Which is of probative value and relevant to sentencing. (*Conyers II*, at 183.) The Court found that even if the issue were preserved for appeal, "the trial court did not erroneously admit 'other crimes'

evidence consisting of domestic violence testimony." (*Conyers II*, at 184.)

Trial counsel cannot be considered incompetent for not objecting to evidence which the Court of Appeals found appropriate.

B9. Petitioner alleges that appellate Counsel should not have raised unpreserved issues on appeal. He states that undeveloped facts would have aided the Court of Appeals. The only undeveloped facts cited were the alleged efforts of Charles Johnson to make a deal and Detective Marll's efforts to verify Charles Johnson's information. These facts have no significance to any of the "unpreserved" issues other than the testimony of Detective Marll. With regard to that testimony, it is only relevant to the credibility of his testimony, not its admissibility. If counsel had objected to Detective Marll's testimony and preserved the issue, no additional facts would have been available to the Court of Appeals in 1998.

Counsel's logic and reasoning was well placed in selecting issues which the Court may agree to review. In fact, he was successful in getting the Court to answer them. The only "disastrous" result was that the Court ruled against the Petitioner.

B10. Petitioner alleges that counsel failed to object to evidence of Petitioner's conviction of the murder of Lawrence Bradshaw. Petitioner moved in limine to preclude any reference to the Bradshaw murder. The Court overruled the Motion to the extent that Petitioner's conviction for the murder of Lawrence Bradshaw was in the PSI. Counsel cannot be considered incompetent for failing to object to evidence the Court of Appeals ruled proper.

Ironically, even the Court of Appeals was unaware that, after Judge Simpson had ruled the reference in the PSI admissible, the State and defense agreed to remove the reference to Lawrence Bradshaw's name in the PSI with regard to the murder conviction. At page 5 of the PSI in the description of Petitioner's murder conviction the name "Lawrence Bradshaw" was removed and replaced with "the victim." In fact, trial counsel did not allow the information to go to the jury.

Bradshaw's name still appears in the PSI as a named co-defendant and indicates he was deceased, but there is no reference to Petitioner's responsibility in his death.

B11. Petitioner alleges that counsel, at trial and on appeal, failed to request sufficient voir dire to determine predisposition toward the death penalty. The questions posed were essentially the same questions reviewed by the Court of Appeals in *Evans v. State*, 333 Md. 660, 637 A.2d 117 (1994). The Court found "(t)he questions posed to the venire persons were sufficient to uncover any pro-death penalty bias and measure that bias against the standard for juror exclusion." *Evans* at 677.

The only distinction between the voir dire in this case and *Evans* is the existence of life without parole. Petitioner argues that one who may favor life without parole is inappropriately predisposed to the death penalty. This is illogical. The juror has just stated his or her willingness to impose life or life without parole if appropriate.

As counsel pointed out at the Hearing, the Petitioner was already serving a life without parole sentence. The distinction between the two was, therefore, unimportant.

Had Mr. Braudes raised the issue on appeal, he would have been unsuccessful in light of *Evans*.

B12. Petitioner alleges that counsel failed to request a jury instruction relating to the murder of Lawrence Bradshaw. As noted at B10, the jury did not know that the Petitioner murdered Lawrence Bradshaw. It would have only caused harm and confusion to request such an instruction.

B13. Petitioner alleges that Mr. Dantes and Ms. Wallace failed to object to a comment by the State at closing argument that Petitioner is a "cold-blooded career killer." It was never said. At page 49 of the January 28, 1998, transcript, in addressing the mitigator of youthful age, the State said that the Petitioner "is a cold-blooded career criminal." At that time, the Petitioner had been adjudicated delinquent of breaking and entering three (3) times, theft three (3) times, and possession of a deadly weapon. He had been convicted as an adult of three (3) charges of robbery with a dangerous and deadly weapon (from two (2) separate events), three (3) counts of use of a handgun in the commission of a crime of violence, and two (2) separate first degree premeditated murders.

This comment was well within the bounds of proper argument.

There was no basis for objection by trial counsel.

B14. Petitioner alleges that counsel failed to object to argument of the State regarding the weighing process at sentencing. First is an assertion that the State encouraged the jury to decline to engage in the weighing process. Petitioner fails to include the first sentence of the paragraph in its excerpt which causes the comment to appear out of context. At page 100 of the transcript from January 28, 1998, the State said "(i)t's the State's position that there are no mitigating circumstances." In this instance, if the jury finds no mitigating circumstances, there is no weighing process.

The State then went on to concede that the jury may disagree with the State and find a mitigating circumstance. The State then specifically told the jury to conduct the weighing process. The State rhetorically asked what could outweigh this crime. The State conceded that this one (1) line was a misstatement of the law. It was immediately corrected in asking what could even come close to being in equal balance. The statement that nothing comes close to this crime is consistent with argument that the crime outweighs any mitigating circumstances.

At page 51, the State stated that the jury can enter death only if the aggravating factors outweigh the mitigating factors. In its opening remarks to the jury at page 194, the State advised the jury that it must find that the aggravating circumstances outweigh the mitigating circumstances in order to find death to be the appropriate sentence.

The trial judge's instructions on the burdens of proof were clear on this issue (see Transcript, January 28, 1998, page 28). The Findings and Sentence Determination Form is also clear on the appropriate burdens. Even if it was error to fail to object to the slight misstatement, there can be no legitimate argument that the jury was in any way affected.

B15. Petitioner alleges that counsel failed to object to expressions of personal feelings and speculation of facts. This issue is addressed in A24.

The excerpted argument was proper comment and a legitimate inference which could be argued from the facts presented. The argument was in response to an opposite inference which defense counsel drew from the same facts in his closing argument.

Any objection would have been overruled as fair comment on the evidence. Even if somehow considered to be error, upon request, the trial judge would have reinstructed the jury that argument is not evidence.

B16. Petitioner alleges that counsel failed to request that the language of the Findings and Sentence Determination Form be amended to remove the word "evidence."

The Court of Appeals addressed this issue when considering a challenge to the instructions involving sympathy or mercy. The Court stated, at footnote 5 of *Conyers II*, that although the form says "evidence," the trial judge made it clear that 'evidence' means more than testimony and the physical exhibits." In this case, the jury had no reason to believe that evidence meant anything other than any fact or circumstance made known to them at the proceedings. There was, therefore, no reason to object to the form.

In addition, the form used came directly from the Maryland Rules as adopted by the Maryland Court of Appeals. There is no prejudicial affect.

B17. Petitioner alleges that counsel failed to ask the trial judge to remove all reference to unanimity as to mitigating circumstances on the Sentencing Form. Petitioner argues that the Eighth Amendment prohibits "requiring jurors to unanimously agree" on mitigating circumstances. A review of the form used in this case in conjunction with the trial judge's instructions, makes it clear that the Form does not require unanimity. The Form is proper. Therefore, there is no rational basis for objection.

B18. Petitioner alleges that trial counsel erred in allowing the aggravators of robbery and attempted robbery to go to the jury. The aggravating circumstance listed in Article 27, Section 413 is "the Defendant committed Murder

while committing or attempting to commit a . . . robbery." If the commission or attempted commission is established, then the aggravator is shown. The jury was accurately instructed.

B19. Petitioner appears to re-raise three (3) allegations raised against original trial counsel.

a) Failure to object to the jury overhearing bench conferences - There is no evidence in the sentencing proceeding that the jury heard or could have heard bench conferences.

b) Failure to object to prejudicial photographs - Counsel did, in fact, object and the issue was raised on appeal. The Court of Appeals ruled that the trial judge's rulings were appropriate.

c) Failure to object to audible comments by the audience - Petitioner presents no evidence that this occurred. There is no showing of any adverse affect on the jury or the proceeding.

B20. This issue is addressed in A25.

C. COURT ERROR AT TRIAL IN THE GUILT/INNOCENCE PHASE

C1. The trial court did not err in dismissing jurors during voir dire. Each juor dismissed for cause was appropriate. In addition, this issue has been waived under Article 27, Section 645A(c) .

Article 27, Section 645A(a) (1) provides that a determination of waiver precludes instituting a proceeding for Post Conviction Relief:

> (A)ny person convicted of a crime and either irlcarcerated under a sentence of death or imprisonment or on parole or probation . . . may institute a proceeding under this subtitle in the circuit court for the county to set aside

> or correct the sentence, provided the alleged error has not been previously and finally litigated or waived....
> (Emphasis added.)

Article 27, Section 645A(c) describes the circumstances under which waiver occurs:

> (1) (F)or the purposes of this subtitle, an allegation of error shall be deemed to be waived when a Petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said Petitioner actually took such an appeal) . . . unless the failure to make such allegation shall be excused because of special circumstances. The burden of providing the existence of special circumstances shall be upon the Petitioner.
>
> (2) When an allegation or error could have been made by a Petitioner before trial, at trial, on direct appeal (whether or not said Petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said Petitioner, in a prior Petition under this subtitle, or in any proceeding actually instituted by said Petitioner, but was not in fact so made, there shall be a rebuttable presumption that said Petitioner intelligently and knowingly failed to make such allegation.
> (Emphasis added.)

The Court of Appeals has held that the "knowing and intelligent" waiver standard of Article 27, Section 645A applies only to the waiver of fundamental rights. *Curtis v. State*, 284 Md. 132, 396 A.2d 464 (1978). The Court of Special Appeals has defined fundamental rights "as being, almost without exception, basic rights of constitutional origin, whether federal or state, that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth determining process." *Wyche v. State*, 53 Md. App. 403, 454 A.2d 378, 380 (1983) (citations omitted) (emphasis added). The Court of Special Appeals has made clear that "(i)f the right alleged to have been violated is a non-fundamental right, waiver will be found if it is determined that the possibility existed for the Petitioner to have raised the allegation in a prior proceeding, but he did not do so." *Id.* at 380.

Claims that are deemed "waived" by the prior failure to assert them cannot be heard on Post Conviction. Article 27, Section 645A(a) (1), (c) (1).

The question of whether a claim raised in a Post Conviction Petition has or has not been waived can be answered only after a determination of the nature of the right, i.e. fundamental or non-fundamental. *Hunt v. State*, 345 Md. 122, 691 A.2d 1255 (1997).

If the claim involves one of those few rights that courts traditionally require a defendant knowingly and intelligently to relinquish on the record (sometimes referred to in the case law as a fundamental right), then the provisions of Article 27, Section 645A(c) apply. If the issues does not implicate such a right, but instead comes within the remaining "vast array of trial decisions, strategic and tactical, which must be made before and

during trial," then the provisions of Section 645A(c) do not apply, and the issue of waiver is controlled by pertinent case law, statutes or rules. See *Hunt v. State*, 345 Md. 122 (1997); *Walker v. State*, 343 Md. 429 (1996); *Williams v. State*, 292 Md. 201, 215-16 (1981); *Curtis v. State*, 284 Md. 132, 149-50 (1978).

a. The narrow band of so-called "fundamental rights."

i. Fundamental rights are few, and are recognized by whether, for waiver of the right, the defendant himself must make a knowing and intelligent relinquishment of the right on the record, pursuant to *Johnson v. Zerbst*, 304 U.S. 458 (1938). See *Hunt v. State*, 345 Md. 122 (1997); *Oken v. State*, 343 Md. 629 (1996). Rights deemed to be fundamental are the right to counsel and the right to a jury trial.

ii. Not every right that is of constitutional magnitude is a fundamental right. *State v. Rose*, 345 Md. 691 A.2d 1314 (1997). For example, the right to an instruction that properly defines the "beyond a reasonable doubt standard of proof, " though a matter of due process, does not implicate a fundamental right. *Id.* Likewise, the right to an instruction that correctly identifies the elements of a crime is not among those constitutional rights that are deemed fundamental. *Walker v. State*, 343 Md. 629 (1996). Nor is the right to have a capital jury voir dired on matters regarding imposition of the death penalty among these rights. *Oken v. State*, 343 Md. 256 (1996).

iii. When an allegation of error respecting a fundamental right is made for the first time in a Post Conviction Petition, there is a rebuttable presumption that the Petitioner intelligently and knowingly failed to make such allegations. Article 27, Section 645A(c)(2).

b. Non-fundamental rights.

i. The vast majority of claims raised in Post Convictions do not implicate fundamental rights. As noted, *supra*, waiver of any such claim is governed, not by the Post Conviction statute but, instead, by general principles of waiver created by case law, or rule of procedure.

ii. A defendant will be bound by the tactical decisions as well as by inadvertent actions of defense counsel to raise a claim at trial, on direct appeal, or in an earlier Post Conviction Petition. *Walker v. State*, 343 Md. at 644; *Oken v. State*, 343 Md. at 270-71. The Court pointed out in *Oken* "the potential for chaos if every time counsel made a tactical decision or a procedural default, the 'intelligently and knowingly' waiver standard was triggered."

iii. Thus, the Court of Appeals has "consistently held that the failure to object to or otherwise challenge a jury instruction constitutes a waiver of the issue for purposes of Post Conviction," e.g. *State v. Rose*, 345 Md. 238, 691 A.2d .1314 (1997) (challenge to reasonable doubt instruction waived on Post Conviction by failure to object at trial or to

raise claim on appeal); *Walker v. State*, 343 Md. at 638 (challenge to incorrect instruction on the elements of assault with intent to murder waived on Post Conviction by failure to raise at trial, or direct appeal, or in earlier Post Conviction Petitions).

Because counsel's decisions, actions, and inactions bind the defendant, a waiver can be found even where the defendant is personally without knowledge or understanding of the matter. *Walker*, 343 Md. at 641; accord *McElroy v. State*, 329 Md. 136 (1993); *Curtis v. State*, 284 Md. 132 (1978) .

Only in rare instances will a claim be considered on its merits. The "escape mechanism" to be applied to the waived claim depends, however, on whether the claim involves a fundamental or a non-fundamental right. *Hunt v. State*, 345 Md. 122, 691 A.2d 1255(1997) .

For fundamental rights, if there has been a knowing and intelligent relinquishment of the issue, the Petitioner "may allege, and must prove, the existence of special circumstances excusing the failure to raise a right recognized under Article 27, Section 645(c). Otherwise, he or she is without recourse." *Hunt v. State*, 345 Md. 122 (1997).

For the vast majority of claims that are non-fundamental, only the court "may review otherwise unpreserved issues under the discretion granted by Maryland Rule 8-131." *Hunt v. State*, 345 Md. 122 (1997). This discretionary review has been described by the Court of Appeals as "plain error" review. *Walker v. State*, 343 Md. at 647-48.

i. The authority to exercise plain error review lies with both the Post Conviction court itself, and the appellate court on review of the Post Conviction court's decision. See, *id.* "[T] his Court has taken the position that a court, in a Post Conviction proceeding, can excuse a waiver based upon an earlier procedural default if the circumstances warrant such action." *Oken v. State*, 343 Md. at 272-74.

ii. Inherent in such discretion, however, is the entitlement of the court to decline to excuse the waiver. See *Hunt v. State*, 345 Md. 122 (declining to excuse waiver of right to have potential juror struck due to statutory disqualification; declining to consider merits of claim that previous defense counsel had made the tactical decision not to raise at earlier time); *Walker v. State*, 343 Md. at 647 (declining to take cognizance of an erroneous instruction); *Oken v. State*, 343 Md. at 274 (acknowledging its discretion to review a waived claim, but finding "no circumstances excusing the failure to raise the issue on direct appeal."

C2. There is no evidence that Charles Johnson was a state agent at the time of the Petitioner's statements to him. In fact, Judge Simpson found that he was not. This issue is addressed in A1 and was waived under Article 27, Section 645A(c).

C3. Petitioner alleges that Judge Simpson should have sua sponte acted to stop the testimony of Monica Wilson regarding the $20.00. This issue is addressed in A8.

The generic confrontation clause and Due Process assertions of Petitioner have no applicability in a situation where no objection was posed. The additional due process argument that there was insufficient evidence of robbery is inconsistent with the Court of Appeals' ruling in *Conyers II* that there was sufficient evidence.

C4. Petitioner again argues that the trial judge failed to sua sponte strike testimony of Monica Wilson. The issue of Monica Wilson's testimony about the two (2) .38 handguns was addressed in *Conyers II*. Judge Simpson and the Court of Appeals found that the statements were not a violation of the Sixth Amendment.

C5. This allegation was directly addressed on appeal by the Court of Appeals in *Conyers I*. The issue has been finally litigated under Article 27, Section 645A(b).

C6. This issue was addressed by the Court of Appeals even though it was not preserved. Therefore, the issue has been both waived and finally litigated.

C7. This issue is addressed in A10; there was testimony about Monica Wilson's drug use. The Court's rulings upon the eventual objection by the State were proper.

C8. This issue is addressed in A14; counsel asked what Mr. Bradshaw did for an income. The Court's ruling was appropriate.

C9. The trial court's actions with regard to reaction or comments from the audience were appropriate. See *Hunt v. State*, 312 Md. 494, 540 A.2d 1125 (1988).

C10. The issue of crime scene photographs was addressed in *Conyers II* in dealing with the same photographs. The Court of Appeals found that Judge Simpson's discretion was properly utilized. This issue is both waived and finally litigated.

C11. There is no evidence that the jury could hear any bench conferences. In fact, Mr. Walker testified at the hearing that he was attuned to the issue and that if he felt there was a problem, he would have acted.

C12. This issue is addressed in A24; all statements and arguments of the State were proper. There was no reason for the Court to act sua sponte.

C13. Charles Johnson never testified that the Petitioner and Lawrence Bradshaw intended to rob people. He said "hustle." As noted in AI5, the Court of Appeals addressed and rejected this as a viable issue. This issue has been finally litigated.

C14. This issue is addressed in C13.

C15. The issue of severance/joinder was fully addressed by Judge Simpson and the Court of Appeals in *Conyers I*. This issue has been finally litigated. In *Herring v. Meachum*, 11 F.3d 374 (1993), cited by Petitioner, the Federal Circuit Court found that there was no actual prejudice by joinder of two (2) unrelated murders. The Court recognized that states can join cases for judicial economy alone if there is no showing of actual prejudice. These counts were joined for a valid evidentiary reason, not just judicial economy.

C16. There is no requirement that a trial judge must sua sponte instruct a jury on an issue which clearly could entail a tactical decision by counsel. As noted in A21 through A23, there were logical reasons not to want such an instruction. A trial judge should not interject himself into tactical decisions.

D. <u>COURT ERROR IN SENTENCING PHASE</u>

D1. The trial court properly ruled in restricting the testimony of the three (3) noted witnesses. The issue was raised on appeal and finally litigated in the ruling by the

Court of Appeals in *Conyers II*. In addition, this issue is addressed in Bl.

D2. This issue is addressed in B4. This issue has been finally litigated.

D3. This issue is addressed in B4. This issue has been finally litigated.

D4. This issue is addressed in B7 and by the Court of Appeals in *Conyers II*. The issue has been finally litigated.

D5. This issue is addressed in B8 and by the Court of Appeals in *Conyers II*. The issue has been finally litigated.

D6. The aggravating circumstance presented to the jury was that the Petitioner committed or attempted to commit a robbery. There was sufficient evidence that this circumstance existed.

In addition, the issue has been waived.

D7. This issue is addressed in B10; there was no evidence presented to the jury about the murder of Lawrence Bradshaw. Therefore, a limiting instruction would be illogical.

D8. This issue is addressed in B6, B13, B14, and B15; all of the arguments of the State were proper. Therefore, sua sponte action by the Court was unnecessary and inappropriate.

In addition, this issue is waived.

D9. This issue is addressed in BI6 and by the Court of Appeals in *Conyers II*, the issue is both waived and finally litigated.

D10. This issue is addressed in C17; the sentencing form used was as directed in the Maryland Rules and was appropriate.

In addition, the issue is waived.

D11. This issue is addressed in B11. The Court's *voir dire* was sufficient and appropriate. See *Evans v. State*, 333 Md. 660, 637 A.2d 117 (1994).

In addition, the issue is waived.

D12. There is no evidence that bench conferences were overheard by the jury or that there were audible comments from the audience. If any incident occurred, the issue is waived.

D13. This issue is addressed in B2.

E. STATE VIOLATIONS OF DUE PROCESS

The State has an obligation to provide any and all exculpatory evidence. As noted on the record of these proceedings, the State provided open file discovery to counsel in each proceeding. No matters were concealed in any way from Petitioner's counsel.

Petitioner has provided nothing from the State's file or the police investigative files that had not been previously produced. This, despite the fact that Andrew Davis was permitted to review all of the files. The *Brady* issue is addressed in H1.

E1. This issue is addressed in A4; this allegation is unsupported by evidence. Charles Johnson never provided information to the State regarding Martin Quincy Johnson, nor did he testify.

E2. This issue is addressed in A5; this allegation is unsupported by evidence. The State cannot produce that which does not exist. Ms. Hadel apparently was never shown a photo array containing Clarence Conyers. One cannot "fail to pick" someone out of a photo array if the person is not in the photo array.

E3. This allegation is unsupported by evidence. As Ann Brobst, A.S.A., testified, the only agreement with Deborah Meyers was the letter of October 31, 1994. This letter was

produced in discovery. Ms. Brobst testified she was aware of no other agreement. Petitioner's current investigator reviewed the State files, the police files, and all prior counsel files and failed to find evidence of any other agreement because no such agreement exists. Deborah Meyers had no other issue to bargain for than that already contained in the October 31, 1994, letter.

E4. This issue is addressed in E3.

F. ADDITIONAL CLAIMS OF ERROR

F1. The issues raised, challenging the constitutionality of the Maryland Death Penalty have been repeatedly addressed by the Court of Appeals, including in *Conyers I* and *Conyers II*, and all of the cases cited therein.

F2. Petitioner's challenge to the method of execution other than the principal of cruel and unusual punishment is not cognizable under Article 27, Section 645A. On the Eighth Amendment issue, it is common knowledge that lethal injection is currently the most humane way to carry out the death penalty.

The alleged violations of the law or regulations in accomplishing an execution is not any matter regarding the proceedings or the Petitioner's representation which would call the regularity of the trial or sentence into question.

G. ISSUES RAISED IN SUPPLEMENT TO AMENDED PETITION

G1. The added issue regarding trial counsel was already addressed in A21(b) and (c).

G2. Petitioner alleges that counsel were ineffective for successfully managing to limit extremely damaging testimony from Detective Marll. This issue is addressed in B7. The record of the original trial showed the affect of Detective Marll's and Detective Bollinger's testimony regarding specific facts that Charles Johnson knew about

the murder that did not appear in any charging papers and had not been released to anyone (including the media) other than the State's Attorney's Office.

As Mr. Dantes testified, Mr. Walker considered this testimony to be devastating. Choosing a battle over what facts Charles Johnson knew that were verifiable and others which are incapable of verification would have been a major mistake. Mr. Dantes' strategy was well reasoned and should not be second guessed.

In addition, as noted previously at B7, Petitioner has failed to show that a different tactical move would have affected the result.

G3. Petitioner alleges that counsel were ineffective for failing to object to the absence of Petitioner from a chambers conference. Counsel testified that any matter ever discussed out of the Petitioner's presence was discussed with the Petitioner.

Petitioner's current assertion is that he was "entitled" to be present. The chambers conference involved a question of law. Maryland Rule 4-231(b) states that a "Defendant is entitled to be present at . . . every stage of the trial, except (1) at a conference or argument on a question. of law." In *Henry v. State*, 324 Md. 204, 596 A.2d 1024 (1991), the Court of Appeals held a "defendant does not have a right to be present at a bench conference if the subject matter being discussed is a question of law."

Moreover, trial counsel had no reason to preserve the issue since he was successful in limiting the effect of what was clearly admissible evidence.

In addition, any alleged error by trial counsel could not have affected the result. Petitioner's presence at a conference on a question of law would not have changed

the result of the conference. Counsel would not have been successful on appeal.

H. STATE VIOLATION OF DUE PROCESS

H1. Petitioner alleges "widespread" violations of due process by the State based on assertions of discovery violations by failing to provide exculpatory impeachment information.

The law on *Brady* violations is relatively clear and was recently restated by the Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936 (1999).

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. . . . Such evidence is material 'if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.'

The Court expanded on the materiality requirement by stating:

> (t)he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether, in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

The inquiry in assessing a *Brady* type due process violation occurs only if (a) the evidence at issue is favorable to the accused; (b) the evidence must have been suppressed by the State (either willfully or inadvertently); and (c) prejudice must have ensued.

Petitioner raised three (3) alleged *Brady* violations at Section E of the Amended Petition. The issues were addressed earlier in E1, E2 and E3.

H2. Petitioner alleges that the State failed to correct false testimony of Charles Johnson and Detective Marll. Based on the evidence, there was no false testimony to correct.

Based on the evidence presented at the hearing, Charles Johnson willingly provided information to the police with no prearranged agreement or deal. He apparently elected not to sign the written statement he willingly provided in the hope that he could arrange an agreement with the State's Attorney's Office in exchange for his testimony at trial. Charles Johnson was telling the truth when he said that "he didn't right out ask for a deal [of the police]." He correctly didn't feel the police could offer a deal. Detective Marll was telling the truth that Charles Johnson didn't ask "for any promises or favors in return for the information" he gave to the police. This is verified by the fact that he did give the information to the police with no agreement or deal.

Charles Johnson did want an agreement in exchange for his "testimony." He knew and/or was told that the police could not accomplish that.

The only evidence which could refute the initial motivation is his subsequent act of securing an agreement to testify for the State in exchange for a benefit for him. This information was provided by the State to all counsel for the Petitioner and was the primary subject of cross-examination.

H3. The second added alleged due process violation was that the State failed to correct Detective Marll's testimony that he knew a significant number of facts provided by Charles Johnson to be true and that he was able to verify

those facts. Those facts are set out in the testimony of Detectives Marll and Bollinger, and include:

a) Petitioner used his daughter's mother's car to accomplish Mrs. Johnson's murder.

b) Lawrence Bradshaw ducked down at the front door of Mrs. Johnson's home.

c) Petitioner went to his daughter's mother's home after killing Mrs. Johnson.

d) Monica Wilson had taken sleeping pills on the day after Mrs. Johnson's murder.

e) Petitioner and Lawrence Bradshaw went to an area near a school on Saturday night.

f) Petitioner met up with Lawrence Bradshaw outside his home near some woods.

g) Lawrence Bradshaw was shot three (3) times to the head.

h) Petitioner had gone to his daughter's mother's home after shooting Lawrence Bradshaw.

All of these facts were verified and were not in any papers available to the media or the Petitioner. Each of those facts were known to Detective Marll before he talked to Charles Johnson.

H4. Petitioner asserts that a number of facts in Charles Johnson's statement were not verified. Each matter is unverifiable or capable of concealment from verification. They are:

a) That he hid the gun in Valerie Curbeam's attic - Detective Marll learned of this a month after the murder. Obviously, the gun could have been moved.

b) That Petitioner told his sister, Ventura McLee, and Valerie Curbeam that he killed Lawrence Bradshaw - It defies common sense to believe that relatives and

friends of an individual will always confirm confessions of a relative or friend to the police.

c) That Petitioner found keys at the front of Wanda Johnson's residence - The keys would not be there when the police arrived because Petitioner apparently took them.

d) That Lawrence Bradshaw had a gun in his pocket when he was killed - Petitioner may have taken the gun when he killed Lawrence Bradshaw.

e) That Petitioner still had the black jacket he wore when he killed Mrs. Johnson - Just because the State has a black jacket, doesn't mean that Petitioner doesn't have another or doesn't know the police have a black jacket.

The Petitioner cites several other matters which are insignificant.

At the trial in 1996, Charles Johnson's reliability had been demonstrated by showing all the details he provided which were true and only the murderer could know.

The issue is addressed by the Court of Appeals in *Conyers II* in assessing challenges to the credibility of Charles Johnson when the Court said:

> Some of the information that Charles Johnson provided regarding the Wanda Johnson murder went beyond anything contained in the papers Appellant had in his cell. Indeed, some of Charles Johnson's information was known only to those investigating the murder and, of course, by the person who committed the crime. Obviously, then, Charles Johnson's information could only have been obtained from Appellant himself. . . . During the sentencing hearing, and also during the defense's closing statements, the jury was made well aware of the Appellant's theory

> that Charles Johnson was a jailhouse 'snitch' who fabricated his conversations with Appellant regarding the Wanda Johnson murder so that he could reduce his own time spent in prison. We can safely assume that the jury took the theory with them into the jury room for deliberations and considered it and any supporting evidence, along with all other evidence in the case, before rendering its verdict. Consequently, we hold that any alleged error did not affect the outcome of the sentencing proceedings and was harmless beyond a reasonable doubt. *Conyers II*, at 161.

Clearly, the alleged additional information did not create a reasonable probability that the result would be different.

I. COURT ERROR AT SENTENCING

Petitioner alleges that Judge Simpson erred by not having the Petitioner present for a chambers conference on a question of law. As noted previously in D13, Maryland Rule 4-231(b) and *Henry v. State* make it quite clear that Judge Simpson acted appropriately.

J. ISSUES RAISED IN SECOND SUPPLEMENT TO AMENDED PETITION

J1. Petitioner alleges that in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed 2d 435 (2000), the Court should find the Maryland Death Penalty procedure to be unconstitutional.

Apprendi holds that "any fact (other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The ruling

was in response to a New Jersey law which permitted a judge, at sentencing, if convinced by a preponderance of the evidence, to increase the maximum penalty for a crime if he finds the root crime to be racially motivated.

Petitioner attempts to stretch *Apprendi* to apply to the weighing phase in the sentencing hearing for a Maryland capital case. *Apprendi* is not applicable. First, the weighing process of the sentencing phase is not an "element" of the crime. Second, the weighing process does not "increase the maximum penalty." (Article 27, Section 412). The penalty for first degree murder is death, imprisonment for life or imprisonment for life without the possibility of parole. This was not the situation set out in *Apprendi*.

Third, the State must prove both principalship and an aggravating circumstance beyond a reasonable doubt. These are "factual" determinations decided by the jury. The weighing process is not an issue of proof. If the jury were to find no mitigating circumstances, the weighing process does not occur. Therefore, it is not an "element" required to be proven to "increase the maximum penalty."

Finally, the weighing process and the standard of proof utilized has been reviewed and approved. In *Tichnell v. State*, 287 Md. 695, 415 A2d 830 (1980), the Court of Appeals addressed the preponderance of the evidence standard in the weighing process and found that it complies with the due process clause of the federal constitution. The same issue has been considered and affirmed in *Foster v. State*, 304 Md. 439, 488 A.2d 1236 (1985); and *Scott v. State*, 310 Md. 277, 529 A.2d 340 (1987). In *Conyers II*, the Court of Appeals cites a number of cases in which challenges to the issues and others on constitutionality of the Death Penalty have been

rejected. The Court also addressed this precise issue in *Conyers II* at 197-199.

J2. Petitioner alleges that all trial and appellate counsel were ineffective for failing to raise the improper standard of proof issue in the weighing process. The Court of Appeals has repeatedly affirmed the propriety of the burden of proof at the weighing stage. Counsel cannot be considered ineffective for failing to challenge a clearly established principal from the Court of Appeals.

Moreover, the issue was in fact raised in both appeals and rejected by the Court of Appeals each time. (*Conyers I* at 576, *Conyers II* at 198-199.)

J3. Petitioner alleges that trial counsel should have asked for a pretrial hearing to challenge the admissibility of "the identification" of a car in a "one photo show up." Petitioner cites *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 967 (1967), which addressed "(t)he practice of showing suspects singly to persons for the purpose of identification." Petitioner cites no authority that this is somehow also applicable to a car.

Further, even if cars are entitled to the same constitutional protections as criminal defendants, Petitioner has failed to show that such a hearing stood any chance of success.

For reasons stated herein, the Petition for Post Conviction Relief will be denied.

30 January 2001 s/ Edward J. Angeletti
Judge Edward J. Angeletti

No. 01-1629 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF MARYLAND,

Petitioner

v.

CLARENCE CONYERS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Respondent accepts the Petitioner's initial question presented. Respondent adds the following additional questions presented.

2. Should the State be permitted to offer testimony by a police officer that the officer verified "each and every statement that [Charles Johnson, a jailhouse snitch] gave to us" based on non-public information, E. 554, when in fact the officer knew that many statements Johnson made without basis in the public record could not be verified or were disproved by the police, and where Respondents' counsel was unaware of the lack of verification of Johnson's statements?

3. Were Respondents' prior attorneys ineffective where prior counsel cross examined Charles Johnson without obtaining available evidence that Johnson had previously lied in detail to the police about his participation in an armed robbery, lied to his employer about his criminal record, lied again when caught by his employer lying about his criminal record, and failed to pay taxes for years immediately preceding his testimony?

4.Was Respondents' Sentencing Counsel Ineffective in Failing to Adequately Present Mitigation Testimony and Evidence, Where Such Testimony by Experts such as a Social Worker or a Psychologist Could Only Have Presented Mr. Conyers in a Better Light to the Sentencing Jury?

5. Did the Petitioner State's summations at trial and sentencing violate Due Process where the State vouched for Charles Johnson's credibility based on false testimony and implied in the trial summation that the jurors should be afraid of Mr. Conyers?

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No. 01-1629

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF MARYLAND,

Petitioner

v.

CLARENCE CONYERS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Clarence Conyers, by counsel, respectfully requests that the Court deny the petition for writ of certiorari filed by the State of Maryland ("Petitioner" or "State") as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

To the extent not disputed or supplemented below, Respondent adopts the Petitioner's Statement of the Case but offers the following supplemental information to the Court. References to the Record Extract, the opinion of the Maryland Court of Appeals reversing Mr. Conyers' conviction, Conyers v. State, 367 Md. 571, 790 A.2d 15 (2002), and other documents follow the State's format in its Petition.

First, in this case the State did not merely fail to disclose impeachment evidence relating to Charles Johnson, the jailhouse snitch, the State's key witness showing Mr. Conyers was a principal in the first

degree in murdering the victim. The State offered false testimony, knowing it was false at the time, by the jailhouse snitch Charles Johnson and by Det. Marll, a Baltimore County police officer, both about the circumstances which led the jailhouse snitch Charles Johnson to cooperate and testify and about the results of the efforts by police to verify Johnson's information. The State's Petition implies that this case merely involves its failure to disclose exculpatory information. However, the State elicited testimony that "Johnson did not ask for any favors in return for the information he provided," yet the State now admits before this Court that "Johnson began negotiations for a possible benefit when it came time to sign his statement." Petition for Writ of Certiorari at 8, 18 (hereinafter, "Cert. Pet."). Although the Court below found that the standard of review applicable to false testimony "is not indicated" and that "we shall not find that the State offered perjured testimony," App. n. 32, 44a-45a and 56a, the Court also commented that the State's approach and its witnesses' responses were "deceptive" and "intended to evade the thrust of [counsel for Respondent's] questioning." Id.

In this case, the State did not merely fail to disclose material impeachment information: the State offered testimony that had the effect of affirmatively misleading the jury as to the truth regarding Charles Johnson the jailhouse snitch's efforts to obtain a benefit for his cooperation. The State also improperly vouched for the veracity of the snitch Johnson's testimony when it knew that Johnson had not told the truth as to his motivation to cooperate. In its trial summation, the State argued repeatedly and falsely that Johnson told the truth. E. 304 ("[H]e came in here and told the truth because it was the right thing to do"), E. 319 (Johnson "walked in here and said the truth, he complied with his plea agreement"). The State

knew at that time that Johnson had not told the truth in his testimony.

Second, the State incorrectly claims in its Statement of the Case that "[a]t the post conviction hearing, Detective Marll repeated his trial and re-sentencing testimony regarding the interview with Charles Johnson and Johnson's written statement." Cert. Pet. at 9. If all Det. Marll did in his testimony during the post conviction hearing was repeat his prior testimony regarding the snitch Johnson's cooperation, then the State's failure to disclose evidence and false testimony now before this Court on the State's Petition would never have been discovered. Instead, the officer Det. Marll essentially admitted facts showing that he and Johnson had mislead the jury previously and falsely denied that Johnson had sought a personal benefit for his cooperation.

Third, the State's Statement of the Case asserts that "[t]he Court of Appeals of Maryland on direct review of the death sentence agreed that the jury was provided a full picture of Johnson." Cert. Pet. at 8-9. However, the Maryland Court of Appeals reached that conclusion without the benefit of the evidence in the post conviction hearing that Johnson sought a benefit at the start of his cooperation and that, contrary to the officer's testimony, much of the information Johnson provided was either disproven or could not be proven by the police. When the Maryland Court of Appeals received a more complete picture of Johnson after the post-conviction hearing, it concluded in the decision under attack in this court by the State that the jury was <u>not</u> provided a full picture of the jailhouse snitch Charles Johnson. Thus, the Maryland Court of Appeals appropriately ordered a new trial, a judgment under attack in this Court by the State.

Fourth, the State fails to advise this Court in its Petition of the numerous issues before the Court falling outside the scope of the

Petitioner's single narrowly crafted Question Presented. In fact, the State incorrectly informs the Court that such matters are "not before the Court." Cert. Pet. at n. 2, pp. 11-12. However, any matter not decided by the Maryland Court of Appeals but properly raised in that Court by Respondent which would support that Court's reversal of the conviction and sentence, and thus affirm the judgment under attack by Petitioner, is properly before this Court. As to these numerous issues, the Maryland Court of Appeals simply stated that "[w]e shall not reach [Mr. Conyers'] remaining issues." App. 60a. A brief summary of the pertinent facts pertaining to those issues identified in the Questions Presented above is set forth below in the Statements of Reasons Why the Writ Should Not Be Granted.

REASONS FOR DENYING THE WRIT

The State contends that certiorari is merited where this case raises an important question on the scope of a prosecutor's discovery obligations, there is a conflict between the Maryland Court of Appeals' decision and decisions of other state courts, and where there will be negative public policy consequences of the judgment if it is not reversed. Upon close review, none of these reasons justify issuing the writ, and there are other issues raised by review of the judgment which also show why the writ should not issue.

1. The Scope of a Prosecutor's Duty to Disclose the Details of Plea Negotiations is Fact Specific and Unworthy of Review by this Court

The State contends that this Court ought to grant certiorari to decide whether the State has a duty to disclose details of plea negotiations pursuant to its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). This Court has

addressed the prosecution's disclosure obligations in numerous prior cases involving impeachment of prosecution witnesses, including recent decisions. See Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972)(prosecution required to disclose evidence of promise to key witness); Napue v. Illinois, 360 U.S. 264 (1959)(failure of a prosecutor to correct the false testimony of a witness denies a defendant due process where disclosed evidence did not "turn what was otherwise a tainted trial into a fair one"). Applying those principals to a prosecutor's disclosure obligations is a fact specific inquiry, poorly suited to review by this Court on the facts of this case, and properly left to lower courts. The decision regarding materiality is fact specific. Information which could be irrelevant in one case could in another case be absolutely critical. For example, in this case the fact that Charles Johnson the jailhouse snitch sought a benefit for his cooperation when he provided a statement to the police was particularly material in light of his denial under oath that he cooperated to help himself, testimony by a police officer that Johnson never asked for a benefit when he did seek a benefit, and the State's summation argument that Johnson told the truth. Thus, the materiality of the withheld information increased as the State offered evidence and argument inconsistent with Johnson's request for a benefit. As the Maryland Court of Appeals put it, "the State was an active participant in the smoke and mirrors effort to mislead [Mr. Conyers] and jury as to the full circumstances preceding and precipitating Johnson's plea agreement." App. 59a.

By contrast, in a case where a cooperating witness seeks a benefit from the start of his cooperation, the prosecution discloses the plea

agreement, the cooperator admits on the stand that he cooperated to obtain a benefit, and the prosecution remains silent at trial as to the cooperator's motive to testify, the absence of any disclose would not be as compelling as it is in this case. Under those circumstances, unlike the circumstances in this case, the prosecution's failure to disclose could have less impact on the jury's deliberations.

By way of another example, one among many, in a particular context the prosecution's obligation to turn over evidence for impeachment purposes extends to proffers made by counsel which are inconsistent with testimony later given by a State's witness. In Spicer v. Roxbury Correctional Institute, 194 F.3d 547 (1999), a decision in a Section 2254 action not appealed by the State to this Court but cited by the State, Cert. Pet. 25-27, the prosecutor failed to inform the defense that the State's key witness, a jailhouse informant much like Charles Johnson, had previously given his attorney a different version of the events than that to which he had testified. The Fourth Circuit Court of Appeals found the State's failure to disclose to be a violation of Brady, Giglio, and their progeny.

Thus, because the prosecution's duty to disclose details of plea negotiations, and to disclose its knowledge of a witnesses' motive to cooperate, is a fact-specific inquiry, a new decision by this Court on the extent of a prosecutor's duty to disclose such matters beyond the text of a plea agreement would not provide guidance to the lower courts applicable in other cases and would do no more to provide guidance in such situations to prosecutors , defense counsel and the courts than current cases provide.

2. The Cases Cited By The State As Conflicting Authority Are Factually, And Thus Legally, Distinguishable And, Therefore, Do Not Conflict With The Decision Below.

The State argues that "[t]he decision below conflicts with rulings of other state and federal jurisdictions considering similar Brady claims," Cert. Pet. at 20, and cites two lines of cases— state cases from Indiana and Georgia and federal circuit court cases—in support of that argument. The State goes on to quote selected sentences from selected portions of these cases in what is essentially the citation of obiter dicta. All of the cited cases, however, are factually distinguishable from the instant case and, thus, their holdings do not conflict with the holding of the Maryland Court of Appeals below.

First, in many of the cases, the various appeals courts found that the defendant had simply failed to prove its allegation that there was an undisclosed interaction with the State that provided the particular witness's motivation for testifying. For example, in Rubalcada v. State, 731 N.E. 2d 1015 (Ind. 2000), Rubalcada's accomplice in a drug related murder—Moreno—testified at trial that he had been offered, but had not yet accepted, a plea bargain wherein he would receive 45 years in prison on a guilty plea to murder. Four months after the trial, Moreno pleaded guilty and received a 35-year sentence. The Indiana appeals court held that, despite the difference in sentences, there was no evidence that Moreno's motivation for testifying was anything other than the original plea bargain as disclosed by the prosecution. Id. at 1023-1024.

In Wright v. State, 690 N.E.2d 1098 (Ind. 1988) , an accomplice who supplied the murder weapon—Turner—testified at Wright's trial that he was to stand trial himself later without the benefit of a plea bargain.

Shortly after Wright's trial, however, key witness Turner had his charge reduced from one carrying a maximum of 50 years in prison to one carrying a maximum of eight years in prison and, after pleading guilty, was sentenced to four years. The Indiana appellate court affirmed the factual finding of the trial court, holding that the Defendant had produced no evidence to prove its allegation that there had been a "secret deal" between this witness and the prosecution. Id. at 1112-1115. See also Sigler v. State, 700 N.E. 2d 809, 811-812. (Ind. App. 1998). (Conviction affirmed because trial court not clearly wrong in factual finding that Defendant had not proven allegation of undisclosed pretrial plea agreement of testifying witness.) Id. at 811-812; Lopez v. State, 527 N.E.2d 1119, 1128-1129 (Ind. 1988). (Conviction affirmed because trial court not clearly wrong in factual finding that allegation of undisclosed pretrial promise to reduce witness's sentence not proven.) Id. at 1128-1129; Alderman v. Zant, 22 F.3d 1541 (11th Cir. 1994) (Trial court's factual finding that there was no promise, understanding or agreement was supported by the record.) Id. at 1553-1555.

In some other of the State's cited cases, the appellate court denied relief because the alleged undisclosed promise, even if it was made, presented only harmless error. For example, in McClesky v. Kemp, 783 F.2d 877 (11th Cir. 1985), The Eleventh Circuit held that an allegedly undisclosed police promise to "speak a word for [the witness]" on a pending escape charge would not have affected the jury's decision since the witness, who was testifying against McCleskey in a capital murder case, had already been extensively impeached at trial and, in any event, testified only as to facts that had already been established by two eyewitnesses, McCleskey's accomplice, and McCleskey's own confession. Id. at 884-885. See also

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (Agreement as to where witness would serve time, if such agreement existed, was not material since accomplice/witness in murder case had already been extensively impeached with his favorable plea agreement and other factors.) Id. at 600-602; Patillo v. State, 368 S.E.2d 493 (Ga. 1988) (Failure to disclose agreement to inform judge in witness's violation of probation case of witness's testimony in death penalty sentencing was harmless when death penalty was likely imposed due to brutal nature of crime and defendant's own post-crime written statements, and not due to witness's recitation of defendant's statements to witness.) Id. at 496-498.

In stark contrast in the instant case, the court below found that the undisclosed testimony-inducing interaction was both proven and material. Indeed, the court below found that there was "no question" that the undisclosed interaction—the seeking of a benefit from the State by jailhouse snitch Charles Johnson—had occurred, App. 39a, and that it was "undisputed" that this evidence was withheld from Conyers' lawyers. App. 41a. The court below further held in no uncertain terms that, had the withheld evidence "been disclosed, there was a substantial possibility that the outcome would have been different." App. 56a. Moreover, in the instant case, unlike in any of the State's cited authority, the State did not sit idly by at trial but, rather, seized on the lack of this withheld evidence by consistently trumpeting jailhouse snitch Charles Johnson as a man who came to police and thereafter testified at trial simply to help the quest for truth and not to help himself. App. 25-26. Thus, the decision below turns on entirely different considerations and, therefore, does not conflict with the decisions cited by the State. Consequently, review by this Court on this basis is unwarranted.

3. There Are No Unfortunate Public Policy Consequences of the Court of Appeals' Decision Compelling Review By This Court

The State contends in essence that the Maryland Court of Appeals' decision burdens it with unnecessary and unjustified discovery obligations. Cert. Pet. at 27. It claims that the decision compels prosecutors to "ascertain the details of verbal sparring between the police and a potential witness or to scrutinize the prosecutor's own negotiations with a witness." Id. It also contends that the decision in effect compelled the prosecutor "once he negotiated a plea and disclosed that information to Conyers' attorney to search out from either Johnson or the police some detail of the negotiations that might be perceived as favorable to Conyers." Id.

The State is crying wolf by pointing to the supposedly dire consequences of the Maryland Court of Appeals' decision in this case. The decision requires the State to accurately portray plea negotiations to the jury in the presentation of evidence and summation. Here, the State injected affirmatively misleading testimony into the record by allowing the snitch Charles Johnson and the police, including Det. Marll, to misrepresent their dealings with each other. The decision did no more than require the State's witnesses to tell the truth, and tell the State that it must offer truthful testimony. As far as any burden on prosecution is concerned, the State has long been obligated to learn what its agents, including the police and its witnesses, know which maybe exculpatory or material impeachment. The Maryland Court of Appeals did not add to the State's discovery obligations one iota.

Lastly, the State claims as a public policy consideration that the undisclosed impeachment information "was equally available to Conyers

through reasonable diligence." Cert. Pet. at 27. This factual claim, although never raised in the post-conviction hearing court by the State, and thus completely unsupported by any evidence offered by the State, was nonetheless addressed and squarely rejected by the Maryland Court of Appeals. "This Court is satisfied from review of the relevant portions of the record that the factual predicate underlying [Mr. Conyers'] Brady claims relating to the testimony and examination of Charles Johnson did not arise until the post conviction evidentiary hearing, at which point [Mr. Conyers] properly raised these issues." App. 33a. There was no factual error by the Maryland Court of Appeals, and even if there were, it is not worthy of review by this Court.

4. Perjurious State Testimony Falsely Claiming that All of the Jailhouse Snitch's Information Was Verified by Police, An issue Raised In But Not Decided by the Maryland Court of Appeals, is an Independent Basis to Uphold the Judgment Below Requiring a New Sentencing

As the prevailing party below, Mr. Conyers can defend the judgment of the Maryland Court of Appeals requiring a new trial "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the" Court of Appeals. See Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Part of the judgment below was a finding that the failure to disclose information about the jailhouse snitch pertaining to his effort to secure a benefit required a new trial and was not limited to a new sentencing. However, there were issues pertaining to the sentencing proceeding which were before the Maryland Court of Appeals and were not decided by it which independently support the judgment below to the extent that they compel a new trial or only a new

sentencing.

First and foremost of those issues is the State's false testimony regarding police verification of Charles Johnson the jailhouse snitch's information. The State's witness Det. Marll testified at sentencing that the Baltimore County Police investigated the snitch's representations, which were not contained in the public papers the snitch might have found in Mr. Conyers' jail cell, and all of the snitch's allegations regarding the non-public facts were truthful and were confirmed through police investigation. E. 554. Det. Marll's post conviction hearing testimony showed that his earlier testimony at sentencing that he had verified everything the snitch Charles Johnson told him and found it to be true was, in itself, false. Not only had the police failed to verify much of what the snitch Charles Johnson told them, the police actually found that the snitch provided information which the police determined to be untrue.

The unverified or disproved information in question, E. 1115-1137, was not information relating to insignificant details. The information included the location of the murder weapon, a key piece of evidence in any homicide case. The snitch Charles Johnson told Det. Marll that the murder weapon had been hidden in an attic. E. 1134. So significant was this information that Det. Marll personally searched the attic because Det. Marll told the police the weapon was there. E. 1135. The police did not find a weapon. E. 1135. Curiously, neither Det. Marll nor any other Baltimore County Police officer prepared any documentation about the unsuccessful search. E. 1135. This information, which would have cast serious doubt upon Charles Johnson the snitch's credibility, was never disclosed to the defense. Moreover, Det. Marll's testimony at the post conviction hearing revealed that the snitch Charles Johnson's testimony at sentencing was

false.

The Maryland Court of Appeals noted this issue in its opinion but made no finding on it. The State incorrectly contends that this "issue is not before this Court." Cert. Pet. at n.2 pp. 11-12. The State also contends that to the extent that Det. Marll's testimony about verification of the snitch Charles Johnson's information is in dispute, that testimony was provided at sentencing only at the invitation of Mr. Conyers' counsel. Id. That argument leads to Mr. Conyer's second independent basis to uphold the judgment as to the sentencing: that sentencing and trial counsel were ineffective in attacking the snitch Charles Johnson's credibility.

5. Ineffective Assistance of Prior Counsel Regarding Cross Examination of the State's Jailhouse Snitch Witness Charles Johnson, and Sentencing Counsel's Stipulation to False Testimony by Det. Marll, a State Witness, Regarding Verification of Information Provided by Johnson, Issues Raised In But Not Decided by the Maryland Court of Appeals, Are an Independent Basis to Uphold the Judgment Below

Mr. Conyers contended below that both his prior attorneys at trial and sentencing were ineffective in cross examining Charles Johnson, the jailhouse snitch, and that his sentencing attorney was ineffective in stipulating to false testimony by the State that it verified all of Johnson's information. The Court of Appeals did not reach these two issues, but these issues are an independent basis to uphold the judgment below requiring a new trial.

Both trial counsel, and sentencing counsel two years later, failed to cross-examine the jailhouse snitch Charles Johnson on prior false information he provided to the police. Johnson lied to Baltimore County Police, the same police department who investigated the murders at issue

in this case, in a detailed statement several months before he fingered Mr. Conyers as a murderer. E. 1241, 1249-1251. Johnson falsely denied that he helped rob a Wendy's Restaurant in Baltimore County. Id. His lies to the police led immediately to his arrest and his eventual guilty plea to conspiracy to rob the Wendy's, E. 1252. The statement of charges disclosing the jailhouse snitch Charles Johnson's previous lies to the police was a public record and the trial and sentencing counsel knew Johnson's prior record. E. 410. Thus, Mr. Conyers' attorneys could have obtained the statement of charges containing Johnson's lies, E. 1249-51, from the Court file. The statement could have been used by both attorneys to attack Johnson's credibility, yet neither lawyer retrieved the records and used them. E. 1045-1046. These records would have materially impeached the snitch Johnson's testimony at trial and sentencing and the failure to use this evidence in either proceeding is an independent basis to uphold the judgment below based on ineffective assistance of counsel.

Furthermore, there was additional evidence unavailable at the time of trial but available at the time of sentencing two years later which sentencing counsel could have used but did not use to cross examine Charles Johnson. First, Johnson lied to his employer Murry's Steaks about his criminal record. E. 1233. He falsely denied he was a felon, id., then lied again when confronted with his lies by denying his guilt and failing to disclose a prior robbery conviction. E. 1238. Although he had already pled guilty to the robbery, Johnson claimed that he "was charged with being an accessory to a robbery that I had no knowledge of nor was a part of." E. 1239.

Sentencing counsel agreed this evidence from Murry's Steaks would have been probative of Johnson's veracity. E. 1017-1019. Sentencing

counsel also testified that attacking Charles Johnson's credibility was the heart of his defense at sentencing. E. 1011, 1015.

Second, Johnson failed to file tax returns in 1993, 1994, or 1995, although he claimed on his Murry's Steaks job application that he earned enough to file. E. 907, 1235. Neither Mr. Conyers' trial nor sentencing attorneys investigated Johnson's tax records. E. 1218-1219.

Finally, on a related issue, sentencing counsel was ineffective in stipulating to Det. Marll's, the State witnesses', false opinion testimony that all of the snitch Johnson's non-public information had been verified. Sentencing counsel either did not know what the police had done to verify the statement or if he knew what they disproved then he knew he had stipulated to false testimony. Thus, sentencing counsel's decision to stipulate to the State's opinion testimony that all of Johnson's statements had been verified as truthful was unreasonable and ineffective representation.

6. Mr. Conyers' Sentencing Counsel was Ineffective in Failing to Adequately Present Mitigation Testimony and Evidence, Where Such Testimony by Experts such as a Social Worker or a Psychologist Could Only Have Presented Mr. Conyers in a Better Light to the Sentencing Jury

This issue is another basis, other than the basis designated by the Maryland Court of Appeals, to uphold the judgment below to the extent the judgment required a new sentencing. Sentencing counsel failed to present mitigating evidence at sentencing. He failed to hire a social worker to conduct a psycho-social history of Mr. Conyers' family. After deciding not to utilize an inadequate report completed for the prior sentencing, sentencing counsel failed to obtain his own report or live testimony

providing meaningful family history. Such testimony is routinely offered at capital sentencing hearings, E. 845-846 (standard practice to engage a social worker to assist on mitigation issues), and provides a meaningful framework for understanding the defendant rather than leaving the jury with only the crime to define him.

Sentencing counsel did not present testimony from a social worker or a psychologist supporting mitigation. The jury did not hear any of the compelling mitigation evidence presented at the post conviction hearing, yet all of it was available had sentencing counsel properly prepared for the sentencing. The report by the social worker E. 1221, was "exactly the kind of evidence that a competent attorney could and should present." E. 850. In Williams v. Taylor, 529 U.S. 362 (2000), this Court found that counsel's performance fell below Strickland standards when, like sentencing counsel in the present case, he failed to discover and offer mitigating evidence at sentencing. This failure on the part of counsel undermined the reliability of the outcome of Mr. Conyers' sentencing and requires that he receive a new sentencing hearing.

The extent of Mr. Conyers' involvement in the lives of his family members, especially his children, and the impact that his loss would have to such a close-knit family, offered substantial support to sentencing counsel's theory of mitigation which was that Mr. Conyers would not be a danger in the future. However, sentencing counsel "was unable to ask the witnesses [such as Mr. Conyers' mother and father] the questions that are standard in this type of work." E. 848-849.

Sentencing counsel's sole theory of mitigation in the case was that Mr. Conyers posed no danger to the public. Even that narrow and inadequate approach failed when the sentencing court properly barred

expert testimony on the subject. When asked what was his "plan B" once the court ruled inadmissible his entire effort at presenting mitigation, sentencing counsel indicated that, following the trial judge's suggestion, he simply argued theories of sentencing to the jury. Mr. Conyers' expert testified that sentencing counsels' handling of mitigation "demonstrates . . . they didn't have any idea what they were doing." E. 847.

Thus, sentencing counsel intended to rely on the only type of evidence which is not admissible at a capital sentencing. When it became clear that his approach to mitigation was incorrect, sentencing counsel did absolutely nothing. The compelling mitigation evidence presented at Mr. Conyers' post conviction hearing was available to sentencing counsel at the time of Mr. Conyers' sentencing, yet he utterly failed to present any of it without any strategic reason. Even worse, sentencing counsel's testimony at the post conviction revealed a lack of understanding of what kind of evidence is required from the defense in a capital sentencing.

The record clearly shows that sentencing counsel simply overlooked introducing the mitigation testimony offered at the post conviction hearing. He could not justify his lapse. There were no risks presenting such mitigation. Often mitigation evidence which deals with family pathology or pathological behavior of the accused can hurt the defense case. Here, there was no potential harm to revealing the extent to which Mr. Conyers made positive contributions to the lives of others, and how others, particularly his children, benefit from his life.

The record in the present case reveals that sentencing counsel failed to grasp the concept that a capital sentencing proceeding requires an investigation and presentation of evidence not typically presented in criminal trials. Sentencing counsel completely missed the value of such

evidence and in doing so missed the opportunity Mr. Conyers had to obtain a sentence less than death. Accordingly, counsel's performance was ineffective and Mr. Conyers is entitled to a new sentencing on that basis alone.

7. The State's Unobjected To Closing Arguments at Sentencing and Trial Require Relief

A final independent basis to uphold the Court of Appeals' judgment on a basis other than on the issue reached by that court is the State's closing arguments. Although the Court of Appeals noted that the State argued the jailhouse snitch Charles Johnson's credibility in closing, App. 59a-60a, its decision to order a new trial relied on a finding that the State failed to disclose exculpatory evidence rather than a finding that the State's summations at trial and sentencing were improper. However, both were improper, supporting the Court of Appeals' reversal on that basis alone.

In its trial summation, the State improperly argued repeatedly that Johnson told the truth. E. 304 ("[H]e came in here and told the truth because it was the right thing to do"), E. 319 (Johnson "walked in here and said the truth, he complied with his plea agreement"). The State so argued when it knew that Johnson's testimony had not been truthful as to the reasons he cooperated and his efforts to secure a benefit for himself through his cooperation. The State's improper vouching for Johnson came in the State's trial rebuttal, which followed both the trial court's charge and the defense summation, leaving the State with the final word on Johnson.

The State's numerous additional improper closing arguments at trial included the following: "If this man lives by any rules at all, he lives by this

one rule, don't leave any live witnesses." E. 305. "Ladies and gentlemen, do you want to see what a real live murderer looks like, real live killer? Have a good look. This is what they look like. Right now, you're about forty feet away from a cold blooded killer. For your sake I hope that's as close as you ever get to another one.... He is a cold blooded killer . . . It's a heart of stone over there." E. 306. The State claimed that Mr. Conyers had "ice in his veins," E. 300.

These were appeals by counsel for the State for the jury to consider improper issues in their deliberations, to reach their decision on some other basis than the facts and law in the case, an improper appeal to the jury's emotions, and an improper suggestion to the jury that they should be afraid of Mr. Conyers. The State told the jurors they were close to a killer and hoped they never got closer, an unfair threat which violated due process.

The sentencing summation was similarly flawed. As it had in the guilt/innocence proceeding, at sentencing the State argued Johnson's credibility and claimed that his testimony had been verified by the police. E. 597. As it had in the guilt/innocence proceeding, at sentencing the State argued Johnson's credibility and claimed in addition that his testimony had been verified by the police. E. 597. The State misstated the evidence and the truth, especially regarding its verification of Johnson's testimony. Furthermore, in the sentencing argument the prosecutor attempted to reduce the State's burden of proof with respect to principalship in the first degree, E. 646-647, but see E. 593; demonized the defendant with impermissible name-calling, E. 606 ("Conyers is a cold blooded career criminal"); shifted the burden of persuasion so that the jury would believe that evidence of mitigation must outweigh the crime in order

to give a life sentence, E. 658 ("What could outweigh what he has done? What could outweigh the seriousness of this crime or even come close to being in equal balance to it?"); and, invited the jury to engage in inflammatory speculation as to the victim's final moments while informing them that the thought of it sent chills through his spine, E. 652-653 ("[T]hen you sit and you think of exactly or most likely the hell that she was going through at that moment"). This outrageous argument was not objected to by sentencing counsel. No competent attorney in a capital sentencing would have sat silent through each and every one of these claims.

The closing arguments alone, apart from the many other issues in this case, require a new trial, or, in the alternative, a new sentencing.

CONCLUSION

For these reasons, the Court should not issue the writ of certiorari in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

CLARENCE CONYERS, JR.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

In his brief in opposition, Conyers presents four additional issues to the Court not addressed in the petition for writ of certiorari, relying on the principle that he is permitted to "defend the judgment of the Maryland Court of Appeals requiring a new trial 'on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by' the Court of Appeals." (Brief in Opp. at 11) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)). The new questions he raises are as follows[1]:

1. Did the State offer perjured testimony by a detective with respect to information provided by a government witness?

2. Was trial counsel ineffective in examining a government witness and stipulating to testimony regarding verification of information provided by that witness?

3. Was sentencing counsel ineffective in failing to present mitigating evidence?

4. Did the State's closing arguments at trial and sentencing violate Due Process?

Because these four issues raised by Conyers were not considered and decided by Maryland's highest court (App. 60a), as Conyers concedes, (Brief in Opp. at 11), this Court should, as a matter of policy, decline to address them. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (Court will normally not decide questions neither

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[1] Conyers raises these claims as Questions Presented 2 through 5, but addresses them in the body of the brief as Arguments 4 through 7.

raised nor resolved by the courts below and, "[a]s a general rule . . . do[es] not decide issues outside the questions presented by the petition for certiorari."); *United States v. Nobles*, 422 U.S. 225, 241-42 n.6 (1975) (Court will "decline to entertain" questions presented by a respondent "in the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari," or when there is no "strong suggestion of an abuse" of trial court discretion.). The issues Conyers attempts to bring before the Court in opposing the grant of a writ are without merit, as the highest state court to consider them properly found, and do not independently support the judgment of the Court of Appeals of Maryland.[2]

I.

THE STATE DID NOT OFFER PERJURED TESTIMONY BY A DETECTIVE WITH RESPECT TO INFORMATION PROVIDED BY A GOVERNMENT WITNESS.

This issue is addressed in footnote 2 at page 11of the State's petition for writ of certiorari.

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[2] The dissent in the Court of Appeals of Maryland stated that, while "[t]he majority does not address the other issues . . . were I writing for the majority of the Court, I would affirm on all issues presented." (App. 64a).

II.

TRIAL COUNSEL WAS NOT INEFFECTIVE IN EXAMINING A GOVERNMENT WITNESS AND STIPULATING TO TESTIMONY REGARDING VERIFICATION OF INFORMATION PROVIDED BY THAT WITNESS.

Conyers alleges that counsel were ineffective at trial and re-sentencing for failing to adequately investigate the background of Charles Johnson and for conducting an ineffective cross-examination of Johnson. The applicable standard for assessing counsel's performance is well-established. A defendant claiming ineffective assistance of counsel must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Because Conyers is merely asking this Court to consider the application of *Strickland* to the facts of his case, this Court should decline to hear this issue, as it is a court of law, not a court for correction of errors in fact findings. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). *Accord Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 613-14 (1984). In any event, the decision of the post conviction court was a correct application of *Strickland*.

Before considering Conyers's specific claims regarding

the effectiveness of counsel, the state post conviction court noted the extensive credentials of the attorneys who represented Conyers at trial, at re-sentencing, and on appeal. (App. 92a, 111a). With respect to two of the areas Conyers claims counsel should have explored in cross-examining Johnson--the Wendy's robbery, which was the basis for the indictment pending against Johnson while he was Conyers's cell mate, and the records at Murry's Steaks--the post conviction court noted the exercise of discretion on the part of counsel in foregoing these topics because of the possibility of doing more harm than good. (App. 103a, 114a-15a). With respect to Johnson's alleged failure to file certain tax returns, the post conviction court found that the records did not necessarily indicate a failure to file when required to do so. (App. 104a).

Conyers additionally finds fault with the decision of counsel to stipulate at re-sentencing to Detective Marll's opinion testimony with respect to the truthfulness of Johnson's statements. As discussed in footnote 2 of the State's petition, at trial Marll provided a laundry list of those statements which Johnson could only have learned from Conyers. At re-sentencing, counsel sought, and successfully obtained, the State's agreement to generalize Marll's opinion, believing that such testimony was especially damaging at the first sentencing. The post conviction court concluded that counsel was not ineffective in agreeing to the extent of Detective Marll's testimony, noting that counsel "did an excellent job in getting the State to capsulize the previously devastating testimony into a momentary, generalized answer with no details." (App. 119a).

A reading of the cross-examination of Charles Johnson at trial and re-sentencing demonstrates that counsel

adequately investigated his background and carefully chose a strategy in questioning him that would reflect negatively on Johnson's credibility. Counsel intentionally avoided any questioning that might bolster Johnson's credentials in the eyes of the fact finders. The record establishes that the fact findings and credibility determinations of the state court were not clearly erroneous and that its ultimate holding that counsel were not ineffective in examining Charles Johnson or in stipulating to certain testimony was based on a proper application of the *Strickland* standard. There is no need for further review by this Court.

III.

SENTENCING COUNSEL WAS NOT INEFFECTIVE IN PRESENTING MITIGATING EVIDENCE.

Again, as stated previously, the Court need not review the application of *Strickland* to Conyers's claims that counsel failed to present mitigating evidence at re-sentencing. Since counsel did, in fact, present mitigating evidence at sentencing, what Conyers is claiming is that there was another way to present it and failure to follow another path constituted ineffective assistance of counsel. Such a position is totally contrary to the standard under which this Court judges ineffective assistance of counsel claims. That another attorney might have done things differently does not constitute ineffectiveness. In this case, defense counsel considered what strategy would be most effective and conducted their case accordingly. That it ultimately failed does not make their effort deficient.

Conyers's argument with respect to mitigating evidence centers on his allegation that counsel should have done more to present evidence of his relationship with his family. The post conviction court disagreed, finding that, in addition to favorable family background information contained in the Pre-Sentence Investigation, Conyers's mother testified at length, with no cross-examination by the State, to Conyers's upbringing and the good relationship he had with family members. (App. 117a). Further, counsel reviewed a social history and an evaluation by a forensic psychiatrist and made a tactical decision not to present this testimony. (App. 118a). The state court found the decisions of counsel to be "well-informed and well-reasoned." (*Id.*).

The findings of the post conviction court are supported by the record. The decision as to what to present in the way of mitigating evidence to the sentencing jury is quintessentially a tactical decision on the part of defense counsel. That decision is based on the circumstances of each case and is accorded a high degree of deference. *Burger v. Kemp*, 483 U.S. 776, 788-89 (1987); *Darden v. Wainwright*, 477 U.S. 168, 185-86 (1986). This Court has repeatedly upheld as a plausible tactical decision even the failure to present at a capital sentencing proceeding any mitigation evidence at all beyond the defendant's own remarks. *See Burger v. Kemp*, 483 U.S. at 788-96; *Darden v. Wainwright*, 477 U.S. at 184-87. Further, relying on personal history evidence as a mitigating factor in sentencing can be a "double-edged sword." *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999). The post conviction court correctly held that counsel were not constitutionally ineffective with respect to presenting mitigating evidence at re-sentencing, and there is no sound

basis for further review of the issue.

IV.

THE STATE'S CLOSING ARGUMENTS DID NOT VIOLATE DUE PROCESS.

Because there was no objection made at trial or sentencing to the State's closing arguments, the issue Conyers raised in state post conviction was that counsel were ineffective in failing to object to remarks made by the prosecutor during closing arguments. Again, this Court should decline to review the application of the *Strickland* standard to the fact-specific issue of counsel's actions in regard to the State's closing arguments. This Court has long held that, in considering claims of improper comments by a prosecutor, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. at 181(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

The post conviction court correctly held that comments by the prosecutor at trial relevant to Johnson's testimony were reasonable and legitimate inferences which could be drawn from the evidence. (App. 110a). Further, according to the court, the State had every right to characterize Conyers as a murderer in forceful and emotional language. (App. 104a). Given that the State's argument was entirely proper, there was no reason for trial counsel to object.

Conyers also points to a number of instances in the State's closing at re-sentencing, claiming that the

argument was so flawed that no competent attorney would have allowed it to continue without objection. The post conviction court disagreed, finding the comments of the prosecutor to be well within the bounds of proper argument. (App. 122a-124a). A complete reading of the prosecutor's argument at re-sentencing supports the state court's conclusion and demonstrates no constitutional flaw. Again, the State was free to comment on the type of person who would commit the crimes for which Conyers was convicted, especially at sentencing where guilt was no longer the issue. The State was, likewise, free to describe the final moments of the victims' lives based on the evidence. As the post conviction court concluded, there was no impermissible shifting of burdens on the part of the prosecutor.

Given the propriety of the State's closing argument, defense counsel cannot be faulted for failing to object. Thus, Conyers has failed to establish any deficiency in his attorneys' performance at trial or re-sentencing with respect to closing argument. For that reason, his claim of ineffective assistance of counsel in this regard was properly rejected by the state court and does not offer a basis for further review by this Court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland, limited to the question presented by Petitioner.

Respectfully submitted,

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